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MAINE RULES OF EVIDENCE

with Advisory Notes

Rules appear in black type, Advisory Notes appear in red type.

ARTICLE I. GENERAL PROVISIONS

RULE 101. SCOPE

These rules govern proceedings in the courts of this state, to the extent and with the exceptions stated in Rule 1101.

ADVISERS' NOTE

Rule 1101 specifies in detail the courts, proceedings, questions, and stages of proceedings to which the rules apply.

RULE 102. PURPOSE AND CONSTRUCTION

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

ADVISERS' NOTE

This generalized statement of purpose is comparable to M.C.R.P. 1 and M.R.Crim.P. 2. It sets the tone of flexibility and liberality in construing the rules to the end that truth may be ascertained. This negates the old-fashioned common-law rule that statutes—or rules—in derogation thereof are to be strictly construed. The rule is a guide as to the principles by which the judge is to exercise his discretion, but not of course a license to disregard the rules to reach a result he believes to be just.

RULE 103. RULINGS ON EVIDENCE

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(b) Record of offer and ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Effect of pretrial ruling. A pretrial objection to or proffer of evidence must be timely renewed at trial unless the court states on the record, or the context clearly demonstrates, that a ruling on the objection or proffer is final.

(d) Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(e) Obvious error. Nothing in this rule precludes taking notice of obvious errors affecting substantial rights although they were not brought to the attention of the court

ADVISERS' NOTE

This rule is declaratory of Maine law. In subdivision (d) the Federal Rule reads "plain error", following F.R. Crim. P. 52(b). "Obvious" is used here to conform to M.R. Crim. P. 52(b), which used that term instead of "plain". M.R.C.P. 61 provides that error "which does not affect the substantial rights of the parties" must be disregarded. There are numerous cases in both Maine and federal courts in which the "obvious" or "plain" error rule has been invoked. There appears to be no difference in treatment by reason of the difference in wording. The power is exercised cautiously and only when necessary to prevent a clear miscarriage of justice. State v. Chaplin, 308 A.2d 873 (Me. 1973).

Advisory Committee Note
(April 1, 1998 amendment)

This amendment [adding sub-§ (c)] is proposed to conform Maine Rule 103 to a 1997 amendment of the federal counterpart. It is believed that this amendment does not change existing law. See Field and Murray, Maine Evidence (4th ed.) §103.7 at p. 26, State v. Knight, 623 A.2d 1272 (Me. 1993).

RULE 104. PRELIMINARY QUESTIONS

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making this determination it is not bound by the rules of evidence except those with respect to privileges and on questions arising in hearings on motions to suppress evidence and the like.

(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon the introduction of evidence sufficient to support a finding that the condition has been fulfilled. The court has discretion to admit evidence conditionally upon the representation that its relevancy will be established by evidence subsequently offered.

(c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness and so requests.

(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.

(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

ADVISERS' NOTE

Subdivision (a) incorporates accepted Maine practice in declaring that preliminary questions of admissibility are for the court. The rule that the court is not bound by the rules of evidence in the determination of a preliminary question is made subject to one exception which requires the rules to be followed in hearings on motions to suppress evidence and the like. This exception is not in the Federal

Rule. The United States Supreme Court has upheld the use of inadmissible hearsay on a motion to suppress evidence, supporting the proposition that the use of such out-of-court statements does not offend the defendant's constitutional right of confrontation under the Sixth Amendment and the due process clause. United States v. Matlock, 415 U.S. 164, 94 S.Ct. 988 (1974). However, when there is a serious factual dispute on an issue which may be decisive of the case, as on a motion to suppress, common fairness requires that the witness be present and subject to cross-examination under the rules of evidence. The words "and the like" are intended to embrace other questions, such as identification, where the rights of a criminal defendant may be seriously jeopardized if the issue is determined without opportunity for cross-examination of the witness with knowledge of the facts. It should be noted that a statement made by a person out of court which is relied upon by the witness in doing certain acts, such as search for evidence, is not hearsay since it is not introduced for the truth of the matter asserted. Rather it is evidence of the information the witness possessed and therefore of probable cause. Apart from this, the rule is that generally prevailing in Maine and elsewhere. There are numerous preliminary questions which the court has always determined without being bound by the rules of evidence. Examples are questions involving exceptions to the hearsay rule, such as whether conduct is intended as assertive, whether a statement was made for diagnostic purposes, whether a document is a business record, and whether a declarant is unavailable. There is no reason to alter this practice. The exception with respect to privileges, which is in the Federal Rule, means that a privilege may not be violated in a preliminary hearing to determine whether or not it exists.

Subdivision (b) is in accord with Maine law. It deals with the problem of conditional relevancy. When Item A and Item B considered separately are each irrelevant in absence of proof of the other, a relevancy objection may be interposed to whichever one is offered first. But a party must start somewhere. This rule requires the proponent merely to bring forward evidence from which the truth of Item A could be found, upon the representation that evidence of Item B will be offered. Evidence of the conditionally relevant Item B can then be shown. The dispute as to the truth of each is ultimately for the jury rather than the judge. But the order of proof is, as generally, for the judge. Rule 611 (a). He can decide whether to hear evidence of Item A or of Item B first. He may take into account the relative prejudice of having the jury hear one rather than the other if the proponent fails to offer evidence of one of them sufficient to warrant a finding of its truth. Whichever one he elects to hear first will be admitted conditionally or, in the traditional phraseology, de bene. If the proponent fails to make good on his representation to offer sufficient evidence of the second item, the evidence of the first will on motion be stricken and the jury instructed to disregard it. See Lipman

Bros. v. Hartford Acc. & Indem. Co., 149 Me. 199, 209 ff., 100 A.2d 246, 252 ff. (1953). It is the obligation of opposing counsel to make the motion to strike. The Federal Rule has no provision about discretion to admit evidence conditionally. The reason for including it is to make it completely clear that the court's control of the order of proof, as provided in Rule 611 (a), is preserved.

Subdivision (c) considers when preliminary questions should be conducted out of the hearing of the jury. In a criminal case a hearing on the admissibility of a confession is constitutionally required to be conducted out of the jury's hearing. Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774 (1964). The Supreme Court has also held as a constitutional matter that the prosecution must at the preliminary hearing establish voluntariness of the confession by a preponderance of the evidence. Lego v. Twomey, 404 U.S. 477, 92 S.Ct. 619 (1972). The Law Court has gone beyond this minimum constitutional standard and required that the judge at the preliminary hearing determine voluntariness beyond a reasonable doubt. State v. Collins, 297 A.2d 620 (Me. 1972). On other preliminary matters the judge has discretion to decide whether the interests of justice require the hearing to be in the absence of the jury. This is the accepted Maine practice. In a criminal case when an accused is a witness, he is entitled on request to have any preliminary hearing conducted out of the jury's hearing.

Subdivision (d) allows an accused in a criminal case to testify on a preliminary matter, such as a motion to suppress evidence, without exposing himself to general cross-examination. There are no Maine cases on the point. The rule does not address itself to the question of subsequent use of testimony given by an accused on a preliminary hearing. As a constitutional matter, however, such testimony cannot be used at the trial as evidence of his guilt. Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967 (1968).

RULE 105. LIMITED ADMISSIBILITY

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court upon request shall restrict the evidence to a proper scope and instruct the jury accordingly. In a criminal case tried to a jury evidence inadmissible as to one defendant shall not be admitted as to other defendants unless all references to the defendant as to whom it is inadmissible have been effectively deleted.

ADVISERS' NOTE

This rule accepts for civil cases the long-standing practice of instructing the jury to consider evidence only on a particular issue or with reference to a particular

party even though it has an obvious and perhaps a highly prejudicial bearing on some other issue or party. In criminal cases, however, the ineffectiveness of such a limiting instruction is recognized. In Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620 (1968), the Court held that the constitutional right of confrontation forbids the use in a joint trial of an oral confession of one codefendant expressly implicating the other when the confessing codefendant does not take the stand and subject himself to cross-examination. The Court concluded that a jury would be unable to put out of mind "powerfully incriminating extrajudicial statements of a codefendant." Long before Bruton, M.R.Crim.P. 14 authorized severance when it appeared that a defendant might be prejudiced by a joint trial. Bruton emphasizes that this potential for prejudice has constitutional force. The rule therefore compels the state to choose between severance and foregoing use of evidence admissible as to fewer than all defendants, with the single qualification that a statement may be admitted in a joint trial if all references to the defendant against whom it is inadmissible have been effectively deleted. This qualification is recognized in Maine. State v. Wing, 294 A.2d 418 (Me. 1972). It will often be apparent that effective deletion is impossible, in which case severance will be necessary.

The last sentence is not in the Federal Rule. For the reasons already stated, its inclusion seems called for by proper respect for the Bruton rule.

RULE 106. REMAINDER OF OR RELATED WRITINGS OR RECORDED STATEMENTS

When a writing or recorded statement or part thereof is utilized in court by a party, an adverse party has the right upon request to inspect it. The court on motion of the adverse party may require the introduction at that time of the writing or recorded statement or any part thereof or any other writing or recorded statement which ought in fairness to be then considered.

ADVISERS' NOTE

This rule codifies the familiar principle of "completeness", which is already embodied in M.R.C.P. 32(a)(4) as to depositions. Its purpose is to enable the court to correct the misleading impression created by taking matters out of context. It applies to writings and recorded statements but not to conversations. When part of a writing or recording is introduced, an adverse party has the right to inspect it and move that any other part be put in evidence immediately after the incomplete portion has been introduced, so that its impact will not be lessened by the delay. The court obviously has a large measure of discretion in determining what in

fairness should thus be contemporaneously considered. The words "utilized in court" are designed to permit the same procedure when a writing is silent on a point as when it is contrary to the testimony of a witness on the stand. A concession drawn from a witness that his written statement does not include a certain thing may be just as misleading as introduction of a part of a statement contrary to his testimony. The Federal Rule uses "introduced" instead of "utilized in court" and thus does not protect against the misleading effect which may result from the use of a statement without its introduction in evidence.

ARTICLE II. JUDICIAL NOTICE

RULE 201. JUDICIAL NOTICE OF ADJUDICATIVE FACTS

(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary. A court may take judicial notice, whether requested or not.

(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

(g) Instructing jury. The court shall instruct the jury to accept as conclusive any fact judicially noticed.

ADVISERS' NOTE

This rule applies only to judicial notice of "adjudicative facts" as distinguished from "legislative facts", a distinction which has caused some confusion. An adjudicative fact is the "what-happened", "who-did-what-and-when" kind of question that normally goes to a jury. It seems reasonable to require, as the

rule does, that a judicially noticed adjudicative fact must be one not subject to reasonable dispute. Legislative facts are those a court takes into account in determining the constitutionality or interpretation of a statute or the extension or restriction of a common law rule upon grounds of policy. They will often hinge on social, economic, or political facts not generally known by intelligent people or readily determinable by resort to sources of unquestioned accuracy. Subdivision (a) excludes legislative facts from the operation of the rule.

Subdivision (b) in stating the kinds of facts which can be judicially noticed is in accord with Maine case law. Torrey v. Congress Square Hotel Co., 145 Me. 234, 242, 75 A.2d 451, 457 (1950). There are many Maine cases allowing judicial notice of facts capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. See, e.g., First National Bank v. Kingsley, 84 Me. 111, 24 A. 794 (1891) (upon what day of the week a certain day of the month falls).

Subdivisions (c) and (d) permit the court to take judicial notice without request and require proper judicial notice to be taken on request. Taking judicial notice without request reflects existing Maine practice, and it seems reasonable to require it in appropriate cases on request of a party.

Subdivisions (e), (f), and (g) explain the procedural mechanics of judicial notice. As a matter of fairness, it assures a party of the right to be heard in opposition to the taking of judicial notice. At the hearing he can offer evidence and argument that the matter is reasonably subject to dispute. If he fails to convince the trial judge, his only remedy is by appeal. He cannot present contrary evidence to the jury because by hypothesis facts can be judicially noticed only if they are not subject to reasonable dispute. The court must instruct the jury to accept as established any judicially noticed fact. It would be absurd to allow jurors to consider, for example, on the basis of their individual recollection or speculation, whether December 4, 1972, actually fell on a Monday as the court had instructed them.

The rule does not distinguish between civil and criminal cases. Most of the criminal cases deal with matters of jurisdiction or venue. State v. Bennett, 158 Me. 109, 116, 179 A.2d 812, 816 (1962) (judicial notice that Hope is in Knox County). But the rule is not so limited. The constitutional right to trial by jury does not extend to matters which are beyond reasonable dispute. For instance, the Law Court has taken judicial notice that alcohol is intoxicating and overruled an exception based on lack of proof of that fact. State v. Kelley, 129 Me. 8, 149 A. 153 (1930).

Finally, this rule has nothing to do with judicial notice of foreign law, which is covered by 16 M.R.S.A. §§ 401–406 and M.R.C.P. 44A.

The Federal Rule adds a sentence in subdivision (g) that in a criminal case the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noted. Since judicial notice is limited to facts not subject to reasonable dispute, there is no reason for not making it mandatory in criminal as well as in civil cases. It would be absurd in a criminal case as in a civil action to allow jurors to question the accuracy of the court's instruction as to what day of the week December 4, 1972, actually was.

It is essential to bear in mind that resort to judicial notice in any case, civil or criminal, is permissible only if the judicially noticed fact is not subject to reasonable dispute. The court must not accept as sufficient the absence of actual dispute over, for example, a scientific conclusion found in a text or treatise. Such a misuse of judicial notice would deprive a criminal defendant of his constitutional right to jury trial.

ARTICLE III. PRESUMPTIONS

RULE 301. PRESUMPTIONS IN GENERAL IN CIVIL ACTIONS AND PROCEEDINGS

(a) Effect. In all civil actions and proceedings, except as otherwise provided by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.

(b) Prima facie evidence. A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a presumption within the meaning of this rule.

(c) Inconsistent presumptions. If two presumptions arise which are conflicting with each other, the court shall apply the presumption which is founded on the weightier considerations of policy and logic. If there is no such preponderance, both presumptions shall be disregarded.

ADVISERS' NOTE

The problems in dealing with presumptions are complex and difficult. First of all, the term has been used in very different senses by courts and legislatures. The generally prevailing view among the commentators is that the word presumption should be reserved for the convention that when a designated fact called the basic fact exists, another fact called the presumed fact must be taken to exist in the absence of adequate rebuttal. It has that meaning in this rule. Laymen,

and courts as well, frequently use it as a synonym for "inference" ("Dr. Livingston, I presume"), a matter of logic and experience, not of law. The trier of fact is free to adopt or reject the inference. The phrase "conclusive presumption" is not a presumption in any useful sense, but a rule of law that if one fact, the basic fact, is proved, no one will be heard to say that another fact, the presumed fact, does not exist. Nor is the "presumption of innocence" in criminal cases really a presumption at all, but rather a forceful way of saying that the prosecution must prove guilt beyond a reasonable doubt and that there is to be no inference against the defendant because of his arrest, indictment, or presence in the dock.

Giving presumption the meaning stated, if the only evidence relates to B, the basic fact, it is universally conceded that when B is established, P, the presumed fact, has to be taken as true. The trouble begins when evidence that P is not true is introduced. One view, still followed in the majority of states, is that the presumption places on the party against whom it is directed the burden of going forward with evidence but that when there is testimony to support a finding of the nonexistence of the presumed fact, the presumption disappears like a bursting bubble and the case proceeds as though there never had been a presumption. Another view is that the presumption continues despite contradictory evidence, and the burden of persuasion is shifted so that the party against whom the presumption is directed must show that the nonexistence of the presumed fact is more probable than its existence.

This rule adopts for civil actions the second of these views and shifts the burden of persuasion to the party against whom the presumption operates. This is a change in Maine law as enunciated in the landmark opinion by Justice Webber in Hinds v. John Hancock Mut. Life Ins. Co., 155 Me. 349, 155 A.2d 721 (1959), where the Law Court took the position that a presumption persists "until the contrary evidence persuades the factfinder that the balance of probabilities is in equilibrium, or, stated otherwise, until the evidence satisfies the jury or factfinder that it is as probable that the presumed fact does not exist as that it does exist." The Hinds rule appears to have worked with reasonable satisfaction, but there have been difficulties in explaining to the jury the concept of probabilities being in equilibrium. Moreover, it involves the logical impossibility of treating a presumption as evidence to be balanced against other evidence when it is not evidence at all but a rule about evidence. The difficulties with the Hinds rule are enhanced because it does not take into account the different types of presumptions. Most presumptions are grounded upon an inference; that is, a deduction of fact that may logically and reasonably be drawn from another fact or group of facts. Evidence of these underlying facts can be balanced against evidence of contrary facts. It is not helpful, however, to say that the presumption persists to the point of equilibrium. On the other hand, some presumptions are not based upon rational

inference but are created to reflect a desirable policy. An example is the presumption that goods received by the terminal carrier were in the same condition as, when delivered to the initial carrier. See Ross v. Maine Central R.R., 114 Me. 287, 96 A. 223 (1915). Here there is nothing to balance against evidence that the goods came to the last carrier in damaged condition, and the Hinds rule is particularly ill-adapted to this situation.

The Federal Rule limits the effect of a presumption to fixing the burden of going forward, so that the presumption disappears when evidence is introduced which would support a contrary finding. Thus the offering of testimony which no one in the courtroom believes serves to drop the presumption out of the case. This gives too little weight to presumptions, especially those not based on rational inference.

In shifting the burden of persuasion this rule has the merit of making it unnecessary for the court ever to mention the presumption and making it possible to charge the jury in terms which it can readily understand. It may be thought to give too great an effect to some presumptions, but this seems preferable to the alternative of giving too little weight. In making its choice the Court has adopted the rule originally promulgated by the Supreme Court and incorporated in the newly approved Uniform State Law. It was also looked upon with favor in Justice Webber's opinion which finally settled upon the Hinds Rule.

It should be noted that the rule preserves any statute giving a presumption a different effect. One such statute is the Uniform Commercial Code, 11 M.R.S.A. § 1-201(31), which defines a presumption in terms affecting only the burden of going forward.

There are numerous statutes which state that one fact is prima facie evidence of another fact. The purpose of subdivision (b) is to make it clear that such a statute creates a presumption within the meaning of this rule in a civil case. Rule 303(a) is to the same effect in a criminal case.

Subdivision (c) is designed to resolve the impasse when the court is confronted by inconsistent presumptions. It directs the application of the one founded upon weightier considerations of policy. If policy considerations are of equal weight, both presumptions are to be disregarded. The wording is taken from the Uniform Rules of Evidence approved in 1953 by the Commissioners on Uniform State Laws. The principal class of cases in which the problem has arisen is where rights are asserted under a second marriage but no direct evidence is available of a death or divorce terminating the first marriage before the second. Most courts say the presumption of innocence or of the validity of a marriage is stronger than the presumption of continuance of life or continuance of marriage.

RULE 302. PRESUMPTION OF LEGITIMACY

Whenever it is established in an action that a child was born to or conceived by a woman while she was lawfully married, the party asserting the illegitimacy of the child has the burden of producing evidence and the burden of persuading the trier of fact beyond a reasonable doubt of such illegitimacy.

ADVISERS' NOTE

This rule gives separate treatment to the presumption of legitimacy. Proof beyond a reasonable doubt is required, for reasons of social policy, to rebut this presumption. The rule had its origin in bastardy proceedings but the policy is equally applicable in any action involving legitimacy.

Federal Rule 302 deals with the effect of a presumption in a case where state law supplies the rule of decision, typically a diversity of citizenship case. It obviously has no place in a state code of evidence.

RULE 303. PRESUMPTIONS IN CRIMINAL CASES

(a) Scope. Except as otherwise provided by statute, in criminal cases presumptions against an accused, recognized at common law or created by statute, including statutory provisions that certain facts are prima facie evidence of other facts or of guilt, are governed by this rule.

(b) Submission to jury. The court is not authorized to direct the jury to find a presumed fact against the accused. The court may submit the question of guilt or of the existence of the presumed fact to the jury, if, but only if, a reasonable juror on the evidence as a whole, including the evidence of the basic facts, could find guilt or the presumed fact beyond a reasonable doubt

(c) Instructing the jury. Whenever the existence of a presumed fact against the accused is submitted to the jury, the court in instructing the jury should avoid charging in terms of a presumption. The charge shall include an instruction to the effect that the jurors have a right to draw reasonable inferences from facts proved beyond a reasonable doubt and may convict the accused in reliance upon an inference of fact if they conclude that such inference is valid and if the inference convinces them of guilt beyond a reasonable doubt and not otherwise.

ADVISERS' NOTE

Subdivision (a) makes it clear that Maine statutes using the phrase "prima facie evidence" or "prima facie proof" will be regarded as creating presumptions within the meaning of this rule.

Subdivision (b) recognizes that presumptions in criminal prosecutions pose problems not involved in civil cases. Since a verdict of guilty can never be directed, it follows that the court cannot direct the jury to find a presumed fact against the accused as to any element of the offense. The use of a presumption cannot take away from the jury any evidentiary issue, and the court can submit the existence of the presumed fact to the jury only if the jury could find guilt or the presumed fact beyond a reasonable doubt based on the evidence as a whole. This substantially reflects Maine law. State v. O'Clair, 256 A.2d 839 (Me. 1969).

Subdivision (c) incorporates the recommendation of the Law Court in State v. Poulin, 277 A.2d 493 (Me. 1971), that the trial judge should avoid charging the jury in terms of a presumption, which was thought to be confusing. It refers instead to the right to draw reasonable inferences from facts proved beyond a reasonable doubt, but makes it clear that the jurors are not required to accept the presumed fact. In other words, the presumption cannot be made conclusive.

ARTICLE IV. RELEVANCY AND ITS LIMITS

RULE 401. DEFINITION OF "RELEVANT EVIDENCE"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

ADVISERS' NOTE

This rule states traditional Maine law. See, e.g., Perlin v. Rosen, 131 Me. 481, 483, 164 A. 625, 626 (1933). The rule does not define relevancy in terms of materiality. Relevant evidence is defined as meaning evidence of any fact of consequence to the determination of the action. Materiality looks to the relation between the proposition for which the evidence is offered and the issues in the case. If the proposition is not probative of a matter in issue, it is immaterial. If the proposition is material, evidence which makes it more probable than it would be without the evidence is relevant evidence. Nothing would be gained by including in the rule any reference to materiality. The Supreme Court promulgated the rule in this form and the Advisory Committee Note said that the language "has the advantage of avoiding the loosely used word `material.'"

RULE 402. RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE

All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute or by these rules or by other rules applicable in the courts of this state. Evidence which is not relevant is not admissible.

ADVISERS' NOTE

The general rule that all relevant evidence is admissible is declaratory of Maine law. See, e.g., McCully v. Bessey, 142 Me. 209, 49 A.2d 230 (1946); Turgeon v. Lewiston Urban Renewal Authority, 239 A.2d 173 (Me. 1968). These cases and many others emphasize the extent of the trial judge's discretion. The exceptions make it clear, however, that relevant evidence may be excluded by reason of a statute or a rule. Highly relevant evidence may be excluded by rules based on policy considerations, such as rules of privilege and rules against hearsay. Examples of constitutional limitations are evidence against an accused obtained by unlawful search and seizure and incriminating statements elicited in violation of his right to counsel. These limitations would be binding even if not stated in the rules. They are included for the sake of clarity.

RULE 403. EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ADVISERS' NOTE

This rule reflects Maine law. See e.g., State v. Berube, 297 A.2d 884 (Me. 1972). The trial judge has broad discretion in determining whether the probative value of evidence is outweighed by the risk of unfair prejudice or confusion of issues or by sheer waste of time.

RULE 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608 and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith.

ADVISERS' NOTE

This rule deals with the use of character evidence for the purpose of proving that a person acted in conformity with it on a particular occasion. The separate question of the method of proof, once it is established that character evidence in some form is admissible, is dealt with in Rule 405, and if the character is that of a witness in Rules 608 to 610.

Subdivision (a) states the general rule that character evidence is not admissible for this purpose. This has been Maine law since Potter v. Webb, 6 Me. 14 (1829), in civil cases. It is equally clear that the state in a criminal action cannot introduce initially evidence of the bad character of the accused. State v. Tozier, 49 Me. 404 (1862). This rule is not based on lack of relevancy but rather because the danger of prejudice ("he's a bad man, so he is probably guilty") outweighs the probative value.

Exception (1) applies only to criminal cases. An accused is allowed to produce evidence of his good character, but the state may then rebut it. State v. Tozier, supra.

Exception (2) simply refers to Rules 607 to 609, which deal with evidence of the character of a witness to impeach his credibility.

The rule does not include an exception allowing an accused to offer evidence of a pertinent trait of the character of the victim of a crime as proof that he acted in conformity therewith on the occasion in question. Examples would be character evidence to support a claim of self-defense to a homicide charge or consent in a case of rape. The Federal Rule allows such evidence, but it is omitted from this rule because it has slight probative value and is likely to be highly prejudicial, so as to divert attention from what actually occurred. Absence of this

exception may change Maine law; it is unclear. It should be noted that this rule does not keep out the victim's reputation for violence, proved to have been known to the accused before the event, for the purpose of showing his reasonable apprehension of immediate danger.

Subdivision (b) deals with evidence of other crimes, wrongs, or acts. Such evidence is not admissible to prove character in order to show that a person acted in conformity therewith. The subdivision does not exclude the evidence when offered for another purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Maine law is in accord. State v. Aubut, 261 A.2d 48 (Me. 1970) (evidence of attempt to utter forged instrument of same tenor on same day admissible to show knowledge of forgery); State v. Wyman, 270 A.2d 460 (Me. 1970) (evidence of other crime of precisely similar nature admissible to show intent; jury must be carefully instructed as to limited purpose).

RULE 405. METHODS OF PROVING CHARACTER

(a) Reputation. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

ADVISERS' NOTE

This rule covers the allowable methods of proving character once character evidence has become admissible under Rule 404. Proof may be made by testimony of reputation. This is in accord with Maine law. See Phillips v. Kingfield, 19 Me. 375 (1841); Bliss v. Shuman, 47 Me. 248 (1859); State v. Morse, 67 Me. 428 (1877).

The rule does not follow the Federal Rule in allowing proof of character by the opinion of a witness. There is some justification for that approach, since the jury is likely to think that a witness who says that the defendant's reputation is good is in fact vouching for him. There is, however, the risk that wholesale allowance of opinion testimony would tend to turn a trial into a swearing contest between conflicting character witnesses.

The last sentence of subdivision (a) allows inquiry on cross-examination into relevant specific instances of conduct. Inquiry of a character witness, "Have you

heard . . ." of a certain event was permitted in the leading case of Michelson v. United States, 335 U.S. 469, 69 S.Ct. 213 (1948), in which the trial court guarded the practice from misuse by ascertaining out of the presence of the jury that the question related to an actual event and was not a random shot or a groundless question to "wait an unwarranted innuendo into the jury box." There are no Maine cases on the point, but the practice seems a desirable one.

Subdivision (b) allows inquiry into specific instances of conduct on direct examination when character is actually in issue; that is, when character or a character trait is an operative fact which under the substantive law determines the legal rights of the parties. This appears to be in accord with Maine law. Smith v. Wyman, 16 Me. 13 (1839).

RULE 406. HABIT; ROUTINE PRACTICE

(a) Admissibility. Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

(b) Method of proof. Habit or routine practice may be proved by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine.

ADVISERS' NOTE

Subdivision (a) recognizes the relevancy of a person's habit or the routine practice of an organization in proving that conduct on a particular occasion was in conformity therewith. Rule 404 states the general rule that evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion. Why should habit be treated differently? The rationale is that habit describes one's regular response to a repeated specific situation so that doing the habitual act becomes semi-automatic. It is the notion of the invariable regularity that gives habit evidence its probative force. Evidence that one is a "careful man" or a "careful driver" is inadmissible as lacking the specificity of an act becoming semi-automatic; it goes to character rather than habit. Thus intemperate "habits" cannot be shown to prove drunkenness at the time of an accident. Evidence of other assaults is inadmissible to prove the instant one in a civil action for assault.

The cases have more readily admitted the routine practice of an organization than that of an individual. See, e.g., Commonwealth v. Torrealba, 316 Mass. 24, 54 N.E.2d 939 (1944) (custom of store to give sales slips with each purchase). But in Maine a notary has been permitted to state his usual course of proceedings and his customary habits of business on the issue of notice of dishonor to the indorsee of a note. Union Bank v. Stone, 50 Me. 595 (1862).

It is not clear to what extent this rule changes Maine law. There have been references in the cases to the general rule that prior habits are not admissible to prove the doing of a certain act on a specific occasion. See State v. Brown, 142 Me. 106, 48 A.2d 29, 33 (1966); Duguay v. Pomerleau, 299 A.2d 914 (Me. 1967). In neither of these cases, however, was the reference necessary to the result.

Subdivision (b) allows proof of habit or routine practice by testimony of a sufficient number of specific instances of conduct to add up to a habit or routine. The judge has considerable discretion on this point and may disallow proof of specific instances under the overriding provisions of Rule 403. Subdivision (b) is omitted from the Federal Rule. With it left out, the result would be to go back to Rule 402 and make admissible any relevant evidence as to habit. The inclusion of (b) has a desirable limiting effect.

RULE 407. SUBSEQUENT REMEDIAL MEASURES; NOTIFICATION OF DEFECT

(a) Subsequent remedial measures. When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require exclusion of evidence of subsequent measures when offered for another purpose such as proving ownership, control or feasibility of precautionary measures, if controverted, or impeachment.

(b) Notification of defect. A written notification by a manufacturer of any defect in a product produced by such manufacturer to purchasers thereof is admissible against the manufacturer on the issue of existence of the defect to the extent that it is relevant.

ADVISERS' NOTE TO ORIGINAL RULE 407

Caution! Much of this Adviser's Note is not applicable to the Rule as amended effective July 1, 1996. See below.

Subdivision (a) is directly contrary to Maine law. See Carleton v. Rockland, Thomaston & Camden St. Ry., 110 Me. 397, 86A. 334 (1913). It declares that evidence of repairs and the like after an event is admissible to prove negligence or culpable conduct. The public policy behind the rule against admissibility was that it would deter repairs. This rationale is unpersuasive today. In some instances subsequent repairs may be evidence of culpability. In other instances quite the contrary is the fact. Despite this departure from prior authority, it is still open to the trial judge under Rule 403 to exclude such evidence if he believes its probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury. A situation when the change is effectuated for reasons unrelated to the hazard would be a clear case for such exclusion. Moreover, evidence of subsequent repairs goes only to the proof of an existing defect. It has no relevancy to the question whether the condition had existed long enough before the accident in suit so that the defendant should have known of it. Indeed, evidence that the condition was promptly corrected when the defendant learned of it might be helpful to the defendant.

The exclusionary rule is already subject to numerous exceptions in Maine and elsewhere. See Carleton v. Rockland, Thomaston & Camden St. Ry., supra (evidence of subsequent repairs admissible, not on the issue of negligence, but on whether it was the duty of the defendant or someone else to make the repairs).

It should be emphasized that although evidence of subsequent remedial measures is admitted, it remains for the jury to decide whether the standard of reasonable care has been satisfied. Proof that such measures were taken clearly does not compel a finding that the previous condition reflected culpable conduct.

Subdivision (b) is aimed at the increasingly common situation where a manufacturer sends a "recall letter" to purchasers notifying them of a defect in a product and asking its return for corrective measures. This is relevant as an admission of existence of the defect and would be receivable against the manufacturer under Rule 801(d)(2) unless excluded by reasons of policy. There appear to be no such reasons. A manufacturer of motor vehicles or tires is now required by statute to give notification of any safety-related defect. 15 U.S.C. §1402. Manufacturers of other products would almost certainly give a similar notification. It would be in their enlightened self-interest to do so.

This problem has sufficient similarity to proof of subsequent remedial measures to warrant making it a separate subdivision of the rule. Actually the difference is substantial. Proof of subsequent remedial measures is not an admission of anything. Repairs made after damage related to the very property or chattel involved in an accident may warrant the inference of negligence. Similarly a change in design may warrant the inference that the previous design was faulty. A recall letter is an out-and-out admission of the existence of a defect. The case for allowing it in evidence is much stronger.

The recall letter should not of itself suffice to establish causation. For instance, if there is evidence that the steering gear of an automobile suddenly failed, a recall letter would be admissible as to the existence of a defect. If, however, there is no evidence that steering gear failure caused the accident, the claim would fail for lack of proof of causation.

It would also seem that proof that a plaintiff received and did not heed the warning of a defect would be admissible on the question of his due care.

The Federal Rule follows the conventional doctrine that evidence of subsequent remedial measures is not admissible to prove negligence or culpable conduct and does not deal with the admissibility of recall letters.

Consultant's Note
(July 15, 1995 Amendment)

Caution: This note relates to a version of Rule 407(a) which has been largely superseded!

This amendment is designed to limit the effect of prior Rule 407. The new version of Rule 407(a) makes admissible subsequent remedial measures involving the design or condition of premises or a tangible thing to the extent such measures are logically relevant to an issue in the case. This formulation merely restates and clarifies the prior formulation of Rule 407(a) as that rule applied to premises and tangible things. The amended rule does not make admissible subsequent remedial measures not involving premises or a tangible thing. Thus, the revised rule would not support admissibility of changes in institutional practice, training, procedures, or instructions in cases based on allegedly negligent practice, procedures, training or instructions. The admissibility of post-event changes in cases of this kind is determined by the general rules of relevance, Rules 401-403. Presumably it would

be permissible for the Law Court to construe these rules to re-erect a common law barrier to such evidence, at least in certain contexts.

The amendment also makes evidence otherwise admissible under Rule 407(a) nonetheless excludable if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentatation of cumulative evidence. The inclusion of Rule 403 language in the text of Rule 407 is not intended to suggest that Rule 403 does not apply to evidence made admissible by other rules, but is to make it clear that the positive grant of admissibility in Rule 407(a) is always subject to the authority of the trial court to apply the policies of Rule 403.

Consultant's Note
(July 4, 1996 Amendment)

This amendment is designed to bring Rule 407(a) in conformity with Chapter 576 of the Public Laws of 1996 as enacted by the Maine Legislature on March 29, 1996.

The rule as amended follows Federal Rule 407 in making subsequent remedial measures inadmissible to prove negligence or culpable conduct, but potentially admissible for other purposes. The list of such other purposes for which such evidence may be admitted is not intended to be exhaustive, but includes the most common bases on which admission may be warranted in specific cases. Chapter 576 expressly states that it "applies to causes of action in which the harm or injury occurred on or after the effective date of this Act." Non-emergency legislation of the 1996 legislative session becomes effective on July 4, 1996.

The amendment makes revised Rule 407 effective as of July 4, 1996 and would apply to trials and rulings occurring on or after its effective date regardless of the date of injury or of the date of commencement of the action. This provision on applicability of the new rule was chosen by the Law Court in preference to the corresponding provision of Chapter 576, in the interest of clarity and simplicity of application.

Advisory Committee Note
(April 1, 1998 Amendment)

This amendment is proposed to bring Maine Rule 407(a) in conformity with Federal Rule 407 as amended in 1997. The amendment makes clear that the operative date for "subsequent" is the date of the injury on trial, not the date a product was designed or manufactured, and not the date of some prior failure or other occurrence. The amendment also makes it clear that Rule 407 applies in cases of strict liability and "products liability" as well as traditional negligence.

RULE 408 COMPROMISE AND OFFERS TO COMPROMISE

(a) Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromise or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for, invalidity of, or amount of the claim or any other claim. Evidence of conduct or statements made in compromise negotiations or in mediation is also not admissible on any substantive issue in dispute between the parties.

(b) Evidence of conduct or statements by any party or mediator at a court-sponsored domestic relations mediation session is not admissible for any purpose.

ADVISERS' NOTE

This rule declares evidence of a compromise or offer to compromise or of compromise negotiations to be inadmissible on the issue of liability for or amount of a disputed claim. This goes somewhat beyond present Maine law. In Hunter v. Totman, 146 Me. 259, 80 A.2d 401 (1951), it was held that admissibility depends on intention; if the offer is intended to be an admission of liability coupled with an endeavor to settle, it is admissible to prove liability. The rule avoids the need of determining intention and makes the evidence inadmissible without qualification. The purpose is to encourage settlement discussion and to do away with any need for the cautious lawyer to preface a statement with the words "without prejudice".

Evidence of a compromise offer may be admissible for another purpose, such as tending to show bias or prejudice of a witness.

The Federal Rule omits the reference to "any other claim." It also includes the following sentence: "This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations." The meaning of this sentence is unclear; it seems to state what the law would be if it were omitted. The rule excludes "conduct or statements" made in

compromise negotiations. Surely the presentation during negotiations of admissible evidence would not insulate such evidence from use at the trial, as for example when counsel displays a hospital record. If Congress meant "admissible" rather than "discoverable", the sentence is needless. If it intended to refer to the regular discovery procedures, it seems equally needless. If "discoverable" means something that the adversary would not have learned about except for the settlement negotiations, as a layman might use the term, inclusion of the sentence would be indefensible.

ADVISORY COMMITTEE NOTE
(1985 Amendment)

By 1985 amendment the applicability of Rule 408 to negotiations in domestic relations matters was made more clear by the amendment of the second sentence of Rule 408(a) to refer to "any substantive issue in dispute." The purpose of this amendment was to negate any implication that "compromise negotiations" referred only to the kinds of claims mentioned in the first sentence of the rule, but included any kind of litigable claim, demand, or defense.

Because of the strong public policy favoring free negotiations and free expression of the parties during court-sponsored mediation in domestic relations cases, statements or conduct by any party (including the mediator) occurring during the course of a court-sponsored mediation session are made inadmissible for any purpose.

Advisory Committee Note
(February 15, 1993 Amendment)

It has been suggested by a variety of sources that conduct and statements made in the course of mediation and other alternative dispute resolution procedures should not be admissible in evidence based upon policies fostering the use of mediation and other alternative dispute resolution procedures. Much of what is said and done by the parties during the course of mediation is protected under Rule 408(a) as it existed prior to the 1992 amendment inasmuch as mediation can be regarded as merely a structured form of compromise negotiations. On the other hand, in view of the high level of interest in mediation confidentiality it may be helpful to make it clear that mediation is entitled to the same level of protection as negotiations carried on directly between the affected parties without the participation of a third party facilitator.

It should be noted that this proposed rule revision does not confer any kind of mediator's "privilege." At the time of the enactment of the Rules the Committee restricted its codification of privileges to those which had existed at common law or by statute as of that time. The Committee is reluctant to propose new privileges in the absence of some clear legislative or Court policy indication that such privileges are warranted.

Nor does the amendment create an absolute ban on the use of statements or conduct in mediation for all purposes. Thus, statements or conduct in mediation could be admissible where relevant on some nonsubstantive issues such as bias or prejudice of a witness, credibility of a witness and the like. Statements and conduct in court-sponsored compulsory divorce mediation continue to be subject to a broader protection under Rule 408(b).

The proposed amendment does not address the discoverability of statements or conduct during mediation, nor does it seek to impose any sort of obligation of confidentiality upon any participant in the mediation process. The scope of discovery is within the purview of the civil and criminal rules committees. Confidentiality is an issue for the Legislature or an authority regulating mediators and is not a proper issue for the Evidence Rules Committee.

RULE 409. PAYMENT OF MEDICAL AND SIMILAR EXPENSES

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

ADVISERS' NOTE

This rule is generally in accord with Maine law. Lyle v. Bangor & Aroostook Ry., 150 Me. 327, 331, 110 A.2d 584, 587 (1954). The rule does not supersede or conflict in any way with 24-A M.R.S.A. § 2426, which provides that no payment on account of bodily injury or death or property damage shall constitute an admission of liability or waiver of defense, or be admissible in evidence in an action unless pleaded as a defense; and that any such payment shall be credited upon any settlement or judgment in an action against the payor or his insurer.

RULE 410. WITHDRAWN PLEAS AND OFFERS

Except as otherwise provided, evidence of a plea, later withdrawn, of guilty or nolo contendere, or of an offer so to plead to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal action, case, or proceeding against the person who made the plea or offer.

ADVISERS' NOTE

There is no Maine case dealing with the admissibility of a withdrawn plea. In Massachusetts a guilty plea to drunken driving was later withdrawn and the defendant was acquitted at trial, but the guilty plea was held admissible in an action for personal injuries. Morrissey v. Powell, 304 Mass. 268, 23 N.E.2d 411 (1939). Cases elsewhere are in conflict.

Exclusion of offers to plead guilty makes plea bargaining in a criminal case somewhat easier.

This rule is concerned only with withdrawn pleas. An accepted plea of nolo contendere is not admissible in a civil action. State v. Fitzgerald, 140 Me. 314, 37 A.2d 799 (1944).

The Federal Rule adds a final sentence reading: "This rule shall not apply to the introduction of voluntary and reliable statements made in court on the record in connection with any of the foregoing pleas or offers where offered for impeachment purposes or in a subsequent prosecution of the declarant for perjury or false statement." The primary reason for not including it is that the use of such a statement "for impeachment" raises again the ineffectiveness of a limiting instruction. The jury would almost certainly consider it as an admission of guilt.

RULE 411.

LIABILITY INSURANCE

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully.

ADVISERS' NOTE

The exclusion of evidence of liability insurance or the lack of it on the issue of fault is in accord with Maine law. St. Pierre v. Houde, 269 A.2d 538 (Me. 1970). The inference that an insured person would on that account drive carelessly is too weak. The Maine policy against injection of the fact of insurance into an action is a strong one. See M.R.C.P. 17(a) which, despite the requirement that an action must be prosecuted in the name of the real party in interest, allows a subrogated insurer to sue in the name of the assured. See also Allen v. Pomroy, 277 A.2d 727 (Me. 197 1). Numerous cases apply the general rule that evidence of insurance in negligence cases is "immaterial, prejudicial, and inadmissible." Deschaine v. Deschaine, 153 Me. 401, 407, 140 A.2d 746, 749 (1958). See also Downs v. Poulin, 216 A.2d 29, 33 (1966); Duguay v. Pomerleau, 299 A.2d 914 (Me. 1973) (stating the general standard that reference to insurance is to be avoided unless extraordinary circumstances require it). The rule does not compel the exclusion of evidence of insurance against liability when it is relevant for another purpose, such as proof of agency, ownership or control, or bias or prejudice of a witness.

RULE 412. PAST SEXUAL BEHAVIOR OF VICTIM

(a) In a civil or criminal case in which a person is accused of sexual misconduct toward an individual, reputation or opinion evidence of past sexual behavior of the alleged victim of such misconduct is not admissible.

(b) In a criminal case in which a person is accused of sexual misconduct toward a victim the only evidence of the alleged victim's past sexual behavior that may be admitted is the following:

(1) Evidence, other than reputation or opinion evidence, of sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or

(2) Evidence, other than reputation or opinion evidence, of sexual behavior with the accused offered by the accused on the issue of whether the alleged victim consented to the sexual behavior with respect to which the accused is charged.

(3) Evidence the exclusion of which would violate the constitutional rights of the defendant.

(c) In a civil case in which a person is accused of sexual misconduct toward an individual, evidence of specific instances of sexual behavior by the individual may only be admitted if the court finds that the probative value of such evidence on a controverted issue outweighs the danger of unfair prejudice, confusion of the issues, misleading the jury and unwarranted harm to the individual.

ADVISORY COMMITTEE NOTE
(February 1, 1983)

This Rule prohibits any evidence of reputation or opinion of a victim's character in a prosecution for rape and other serious sexual offenses. It also severely restricts the use of evidence of specific instances of a victim's prior sexual behavior when offered by the defense. The rule is subject to the policy of Rule 402 on evidence constitutionally required to be admitted.

The rule is patterned on new Federal Rule 412 which was enacted by Congress to curb perceived abuses in the use of evidence concerning the past sexual behavior of a victim of rape or sexual abuse. In some courts, wide latitude has been allowed defense counsel to introduce such evidence to show:

A. Lack of overall credibility of the victim, particularly on the issue of consent; and

B. An actual inference that the victim did consent on the specific occasion for which the defendant is charged.

This does not seem to have been a serious problem in Maine where such testimony has been generally excluded. Some of the Maine cases, however, contain dicta that could be read to support admissibility of reputation evidence on credibility and perhaps on consent. See, e.g., State v. McFarland, 369 A.2d 227 (Me. 1977); State v. Dipietrantonio, 152 Me. 41 (1956); State v. Flaherty, 128 Me. 141 (1929). The danger in the admission of such evidence is the likelihood that it will provoke moral and emotional reactions in the trier of fact increasing the risk of unfair prejudice. For this reason, Federal Rule 412 has provided for an elaborate procedure designed to assess the risk of unfair prejudice before admission of such evidence, even to the extent permitted by the rule. In Maine it is not necessary to provide any specific procedure in light of the trial judge's power to control the presentation of the proof so as to minimize prejudice and the overall requirements of Rule 403. Prosecutors, defense counsel, and trial judges should be alert to the fact that Rule 403 does apply even to evidence made specifically admissible by Rule 412 (or any other rule). Where the prejudicial effect of such evidence outweighs the probative value, such evidence must be excluded under Rule 403.

"Sexual behavior" is not specifically defined in the rule, but would include the behavior described by 17-A M.R.S.A. Section 251 (B, C and D).

The word "past" in Rule 412 refers to occasions prior to trial and other than the occasions involved in the charges, whether prior or subsequent thereto in time.

Rule 412(b)(1) would not affect the result in State v. Henderson, 158 Me. 364 (1958), upholding the admissibility of evidence of the victim's prior intercourse with persons other than the accused to attack "corroborating" evidence of the victim's pregnancy offered by the prosecution.

Rule 412(b)(2) only applies to criminal prosecutions where consent of the victim is an issue.

Rule 412 does not prohibit evidence of a statement by the victim about her past sexual conduct when the statement is relevant as a statement for impeachment or some other proper purpose. See, e.g., State v. Nelson, 399 A.2d 1327 (Me. 1979) (rape victim's prior inconsistent statements about her past sexual relations admissible to impeach).

The prosecution may also "open the door" to evidence otherwise inadmissible under this rule by offering evidence of the victim's lack of sexual experience or chastity on direct. See State v. Gagne, 343 A.2d 186 (Me. 1975).

[Note change by 1995 Amendment] Rule 412 does not automatically render admissible evidence of prior sexual behavior in prosecutions for unlawful sexual contact, other criminal prosecutions, or civil cases. Admissibility of such evidence is governed by the other rules on relevancy and impeachment. See State v. Davis, 406 A.2d 900 (Me. 1979) (unlawful sexual contact-evidence of complainant's preoccupation with pulling down the pants of others was relevant to the complainant's state of mind and to rebut the inference that a child of her tender years would be too innocent of sexual matters to fabricate a charge).

Obviously Rule 412 applies to the prosecution as well as to the defense. Thus unless a victim's lack of chastity is properly raised by the defense, the prosecution may not introduce evidence of the victim's chastity to support an inference of lack of consent.

Advisory Committee Note
(1995 Amendment)

This amendment is to conform the terms of the Rules to changes in definition of crimes in the Maine Criminal Code. By 1989 amendment, the crimes of rape and gross sexual misconduct, as earlier defined by the Maine Criminal Code (17-A M.R.S.A. §§ 252, 253) were redefined and combined into the crime of gross sexual assault (17-A M.R.S.A. §253). The policies which made Rule 412 applicable to the crimes as earlier defined remain valid with respect to the redefined and renamed offense.

This amendment also amends Evidence Rule 412 to cover prosecutions for unlawful sexual contact.

Advisory Committee Note
(June 16, 2000 Amendment)

The amendment to Rule 412 is designed to broaden the rule to cover civil as well as criminal cases. The formulation of the rule follows the current Maine Rule 412 rather than the new Federal Rule 412 because 1) the Maine rule has worked well to date, and 2) the structure of the Maine rule seems to lend itself better to application to civil as well as criminal cases.

The amended rule would apply to any case, civil or criminal "in which a person is accused of sexual misconduct toward an individual." Cases involving sexual misconduct but not directed toward an individual (pornography?) would not be covered by either the language or the rationale of this rule. The term "sexual misconduct" is intended to include all forms of civil or criminal misconduct which involve sexual activity or verbal references to intimate sexual activity including sexual harassment, exposure, telephone sexual harassment, intentional infliction of emotional distress. It is not intended to include misconduct not involving sexual activity or verbal references to intimate sexual activity but which is directed at members of a sexually defined group such as some forms of "hate crimes."

"Sexual behavior" is intended to include all forms of intimate sexual activity, whether or not consensual, as well as intimate conversation involving a sexual relationship or sexual gratification.

In both civil and criminal cases reputation or opinion evidence of the sexual character of an alleged victim would be forbidden. There does not seem to be any more reason for this kind of evidence in civil cases than there is in criminal cases.

In criminal cases the rule on evidence of specific instances of conduct would remain "as is." Evidence "constitutionally required" to be admitted (e.g. Jacques, 558 A.2d 706 (1989)) is now included among the enumerated exceptions as is the case with the corresponding federal rule.

Subdivision (c) proposes a somewhat broader rule for civil cases, requiring that the proponent of the evidence satisfy the judge that the probative value of the evidence on a controverted issue outweighs the danger of unfair prejudice, etc. Both the weight (probative value) and the focus (on a controverted issue) would be involved in the determination of admissibility. To cover the possibility that in a civil case an individual whose prior sexual conduct would be protected by this rule might not be the other party, the concept of "unwarranted harm to the individual" has been included in the balancing formula. This formulation erects a meaningful threshold to the use of this kind of evidence in civil cases, but does not forbid it entirely or restrict its use to artificial categories or for specific inferences. The threshold of admissibility under Rule 412 specifies that the evidence can only be admitted if the court find that the probative value of the evidence exceed the danger of unfair prejudice. This is contrasted to the threshold under Rule 403 whereby relevant evidence is admitted unless the danger of unfair prejudice substantially outweighs the probative value.

The same kind of reasoning employed by the Law Court in administering the "constitutionally required" exception to criminal Rule 412 could be applied to administering Rule 412(c) in civil cases. Thus, where the proponent of evidence of prior sexual behavior of a victim could articulate an inference from the prior sexual behavior of the victim which would have a logical bearing directly on a controverted issue in the case, the evidence would be likely admissible in the absence of serious prejudice, confusion, etc.. The court would ordinarily be expected to articulate the relevant inference for which the evidence would be admissible and how the evidence supported the inference. Such evidence can also be admitted in both civil and criminal cases if the opposing party "opens the door."

This rule applies in civil cases to issues of both liability and damages. Rule 403 continues to give the court power to exclude evidence subject to Rule 412 based on considerations such as unnecessary presentation of cumulative evidence and waste of time.

This rule would not restrict evidence of sexual activity of a party to a case other than one in which a person is accused of "sexual misconduct" toward an individual. Thus it would not apply to the defense of truth in a libel case or to proof of character in a custody case. These cases would continue to be governed by Rules 403-405.

The proposed revised rule, as the current Maine Rule 412, does not spell out a special procedure for admissibility determinations. Confiding this matter to the good sense of court and counsel has worked well to date.

RULE 413. PROTECTION OF PRIVACY IN COURT PROCEEDINGS

(a) Evidence of the identity, address, employment or location of any person shall be inadmissible if such person requests the exclusion of such evidence and:

(1) the court is notified that there is a court order in effect that prohibits contact between such person and another person, or

(2) it is alleged under oath, orally or in writing, that such person's health, safety or liberty would be jeopardized by the disclosure of such information, and the court determines that disclosure of such information would jeopardize such person as alleged unless the court finds that such evidence is of a material fact essential to the determination of the proceeding.

(b) The court shall conduct all proceedings to determine the admissibility of evidence under this rule in a manner so as not to disclose the information sought to be excluded, unless the court finds that a party's right to due process and a fair hearing would be violated if the information is not disclosed.

(c) If the court determines that information otherwise inadmissible under this Rule must be admitted as evidence of a material fact essential to the determination of the proceedings, the court shall receive such evidence *in camera*. In child protective proceedings pursuant to Title 22 MRS such evidence shall be received *in camera* and outside the presence of any person subject to a court order (section 1(a) above) or constituting a risk of health, safety or liberty (section 1(b) above) and that person's attorney.

(d) Persons who may object to the admission of evidence under this rule include parties to the proceeding, their attorneys, a guardian ad litem, any person called as a witness, a juror, and any person, who, although not a witness or party, is a subject of the proceeding such as a child or a protected person.

Advisory Committee Note

Rule 413 implements the legislative directive of 4 M.R.S. § 8-B and 22 M.R.S. § 4007(1A) enacted by Chapter 351 of the Public Laws of 2007. The Rule makes evidence of the identity, employment, address, or location of any person inadmissible when there is alleged to be a court order in existence prohibiting contact between that person and another person, or when the court determines that disclosure of the identifying information might jeopardize the person's health, safety, or liberty, unless the court finds that the evidence is necessary to determine the issues in the proceeding.

The court is required to conduct proceedings to determine admissibility under the rule in such a manner so as not to disclose the information at issue unless

such disclosure is necessary as a matter of due process.

Even if the court determines that the evidence should be admitted as necessary to determine an issue in the proceeding, the information is to be received in camera, and, in the case of child protective proceedings, outside the presence of the party or person from whom harm is feared, and outside the presence of his or her attorney.

Objection may be raised under this rule by parties, witnesses, their attorneys, and other persons affected by the proceedings.

Further prohibitions on disclosure, recordkeeping, etc. are the province of others.

ARTICLE V. PRIVILEGES

RULE 501. PRIVILEGES RECOGNIZED ONLY AS PROVIDED

Except as otherwise provided by Constitution or statute or by these or other rules promulgated by the Supreme Judicial Court of this state no person has a privilege to:

1. Refuse to be a witness; or
2. Refuse to disclose any matter; or
3. Refuse to produce any object or writing; or
4. Prevent another being a witness or disclosing any matter or producing any object or writing.

ADVISERS' NOTE

This rule limits privileges to those provided by Constitution or statute or by rules promulgated by the Supreme Judicial Court. This means that common law privileges, such as that between attorney and client, must be included in these rules. On the other hand, a privilege created by statute is preserved without any need to deal with it. No attempt is made to incorporate the constitutional provisions relating to admission or exclusion of evidence. They do not readily lend themselves to codification, and the best point of reference is the provisions themselves and the decisions construing them. The most familiar constitutional privilege is the privilege against self-incrimination. Other concepts having

constitutional dimension are the required exclusion of involuntary confessions, confessions made by one deprived of the right to counsel, and the fruits of unlawful search and seizure. There are also various federal and state immunity statutes to protect persons compelled to testify. A degree of secrecy of grand jury deliberations is provided by M.R. Crim. P. 6(e).

The Court did not use its rulemaking power to create new privileges. Most evidentiary rules relate to what happens in the courtroom and are designed to facilitate ascertainment of the truth. Privileges, on the other hand, are designed to shut out the truth so as to protect relationships of sufficient social importance to assure their confidentiality. This judgment based on social policy is one which is best made by the elected representatives of the people.

Where there is a common law privilege, the Court has felt free in codifying it to fill gaps for which there is no precise Maine authority. Similarly, with respect to statutory privileges, such as the clergyman-penitent privilege, the Court has altered the statutory wording to fit the format of the rules and prescribed details not in the statute but consistent with the legislative policy.

The changes that have been made are set forth in the Notes to the several privileges that follow.

The Federal Rules confine the treatment of privilege to Rule 501, which provides (1) that in federal cases privileges shall be governed by the principles of the common law as they may be interpreted in the light of reason and experience (the language of F.R.Crim.P. 26); and (2) that in actions where state law supplies the rule of decision privileges shall be determined in accordance with state law.

The rules that follow are based in a large measure on the rules with respect to privilege promulgated by the Supreme Court, with some changes made in the Uniform State Law.

RULE 502. LAWYER-CLIENT PRIVILEGE

(a) Definitions. As used in this rule:

(1) A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.

(2) A "representative of the client" is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client.

(3) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(4) A "representative of the lawyer" is one employed by the lawyer to assist the lawyer in the rendition of professional legal services.

(5) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between the client or the client's representative and the client's lawyer or the lawyer's representative, or (2) between the lawyer and the lawyer's representative, or (3) by the client or the client's representative or the lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein, or (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

(c) Who may claim the privilege. The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

(d) Exceptions. There is no privilege under this rule:

(1) Furtherance of crime or fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud; or

(2) Claimants through same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction; or

(3) Breach of duty by a lawyer or client. As to a communication relevant to an issue of breach of duty by the lawyer to the lawyer's client or by the client to the client's lawyer; or

(4) Document attested by lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(5) Joint clients. As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of

them to a lawyer retained or consulted in common, when offered in an action between any of the clients; or

(6) Public officer or agency. As to communications between a public officer or agency and its lawyers unless the communications concern a pending investigation, claim or action and the court determines that disclosure will seriously impair the ability of the public officer or agency to process the claim or conduct a pending investigation, litigation or proceeding in the public interest.

ADVISERS' NOTE

There is nothing in this rule that is believed to be contrary to any Maine decision, but there are several matters on which Maine case law is silent.

Subsection (a)(2) defines "representative of the client" as one having authority to obtain legal services and to act on advice rendered pursuant thereto on behalf of the client. This is an adoption of the so-called "control group" test. It narrows the privilege, confining it to communications by persons of sufficient authority to make decisions for the client. It would not protect communications from lower-level employees to lawyers to enable them to advise a decision-making superior. To illustrate by an example, if a bank teller seeks advice from the bank's attorney whether to accept as sufficient a particular endorsement, the communication would presumably be privileged because the teller would have authority to act on the advice. If, however, he gave the attorney a statement about a customer slipping on a foreign object as he was presenting a check to be cashed, there would be no privilege. This would be true even though his decision-making superiors directed him to make the statement.

The distinction between a privilege and the work product rule embodied in M.R.C.P. 26(b)(3) should be emphasized. If there is a privilege, disclosure cannot be required either in discovery proceedings or at trial. The work product rule gives a qualified protection to unprivileged information prepared in anticipation of trial, which can be overcome by a showing of substantial need. It has nothing to do with admissibility at trial.

Subsection (d)(6) denies a privilege between public officers or agencies and their lawyers unless the communication concerns a pending matter and the court determines that disclosure would seriously impair the conduct of the proceeding in the public interest. No Maine law on the subject has been found.

ADVISORY COMMITTEE NOTE
(February 1, 1983)

In Upjohn v. U.S., 449 U.S. 383, 101 S.Ct. 677 (1981), the United States Supreme Court disapproved of the "control group test" in federal court. The Court declined to attempt to delineate any substitute. Although the control group test is law in a minority of jurisdictions, it appears that there is no consensus in the other jurisdictions as to the best rule to govern the scope of the attorney/client privilege as applied to corporate clients. After carefully reconsidering the matter in 1982, the Advisory Committee has recommended retention of the control group test without change.

It should be reemphasized that the privilege conferred by Rule 502 is independent of the "work product" doctrine which gives discovery protection to certain kinds of material developed by or under the supervision of an attorney in preparation for litigation. In many cases informational communications from employees outside the control group can be protected from civil discovery by the work product doctrine.

RULE 503. HEALTH CARE PROFESSIONAL, MENTAL HEALTH PROFESSIONAL, AND LICENSED COUNSELING PROFESSIONAL-PATIENT PRIVILEGE

(a) Definitions. As used in this rule:

(1) A "patient" is a person who consults or is examined or interviewed by a health care professional, a mental health professional, or a licensed counseling professional.

(2) A “health care professional” is (A) a person authorized to practice as a physician; (B) a person licensed as a physician’s assistant; or (C) a licensed nurse practitioner, under the laws of the State of Maine or under substantially similar laws of any other state or nation, while engaged in the practice of the health care profession for which he or she is licensed.

(3) A “mental health professional” is (A) a health care professional while engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction; (B) a person licensed or certified as a psychologist or psychological examiner under the laws of the State of Maine or under substantially similar laws of any state or nation, while similarly engaged; or (C) a person licensed as a clinical social worker, under the laws of the State of Maine or under substantially similar laws of any other state or nation, while similarly engaged.

(4) A “licensed counseling professional” is (A) “licensed professional counselor;” (B) a “licensed clinical professional counselor;” (C) a “licensed marriage and family therapist;” or (D) a “licensed pastoral counselor” licensed to diagnose and treat mental health disorders, intra-personal and interpersonal problems or other dysfunctional behavior of a social and spiritual nature under 32

M.R.S. § 13858 or under substantially similar laws of any other state or nation, while so engaged.

(5) A communication is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the health care professional, mental health professional, or licensed counseling professional, including members of the patient's family.

(b) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of the patient's physical, mental or emotional condition, including alcohol or drug addiction, among the patient, the patient's health care professional, mental health professional, or licensed counseling professional, and persons who are participating in the diagnosis or treatment under the direction of said professionals, including members of the patient's family.

(c) Privilege of accused. When an examination of the mental condition of an accused in a criminal proceeding is ordered by the court for the purpose of determining criminal responsibility, the accused has a privilege to refuse to disclose and to prevent any other person from disclosing any communication concerning the offense charged, made in the course of the examination.

(d) Who may claim the privilege. The privilege may be claimed by the patient, by the patient's guardian or conservator, or by the personal representative of a deceased patient. The person who was the health care professional, mental health professional, or licensed counseling professional at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the patient.

(e) Exceptions.

(1) Proceedings for hospitalization. There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the health care professional, mental health professional, or licensed counseling professional in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.

(2) Examination by order of court. Except as otherwise provided in subdivision (c), if the court orders an examination of the physical, mental or emotional condition of a patient, whether a party or a witness, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the court orders otherwise.

(3) Condition an element of claim or defense. There is no privilege under this rule as to communications relevant to an issue of the physical, mental or emotional condition of the patient in any proceeding in which the condition of the patient is an element of the claim or defense of the patient, or of any party claiming, through or under the patient or because of the patient's condition, or claiming as a beneficiary of the patient, through a contract to which the patient is or was a party, or after the patient's death, in any proceeding in which any party puts the condition in issue.

ADVISERS' NOTE

There was no doctor-patient privilege at common law. There is at the present time a statutory privilege. P.L. 1973, c. 625, § 218. It is a dubious protection to the confidentiality of the relationship, since disclosure would be required "when a court in the exercise of sound discretion deems such disclosure necessary to the proper administration of justice." Under this formulation no clear assurance to the patient could be given before the communication was made that it would not be ordered to be disclosed.

The rule as promulgated by the Supreme Court did not provide a general doctor-patient privilege, but did define "psychotherapist" so as to include any physician while engaged in the diagnosis or treatment of a mental or emotional condition. The American Medical Association objected to the rejection of the privilege at hearings on the House bill. It did not advocate an unrestricted privilege. It was satisfied that no protection should be given to communications relevant to the patient's condition in an action where the condition was an element of his claim or defense. The Court has adopted a physician-patient privilege in the limited form recommended by the AMA. This is comparable to the exception in the Maine statute of actions "when the physical or mental condition of the patient is at issue." Elimination of the open-ended denial of the privilege at the discretion of the court does not sacrifice any value of importance to the administration of justice, and it relieves the uncertainty in the statute as to the extent of the confidentiality. The rule incorporates the statutory privileges of the psychologist or psychological examiner, 32 M.R.S.A. § 3815, added by P.L. 1968, c. 544, § 82, and the psychiatrist, 16 M.R.S.A. § 60, added by P.L. 1973, c. 481. It has omitted the statutory requirement that a psychiatrist must be "board certified". In fact, board certification is not required as a condition of a psychiatrist's right to practice. The statute on psychologists and psychological examiners has no such requirement. There is no apparent justification for the distinction, nor does it seem right to put upon the patient the burden of discovering whether the psychiatrist is board certified in order to know whether his communications are privileged.

Other changes from the statutes in the rule correct statutory deficiencies (1) declaring "communications" privileged without reference to confidentiality, (2) not including communications to a person reasonably believed to be a psychotherapist, (3) not including the right of a guardian, conservator, or personal representative to claim the privilege or in terms giving a psychotherapist authority to claim it on behalf of the patient, and (4) not including the exceptions listed in the rule. These changes flesh out the legislative intent and are consistent with that intent.

The definition of confidentiality in subdivision (a)(4) and the statement in subdivision (b) of the general rule of privilege are broad enough to include the increasingly common use of group therapy where other patients are present during the communication. Such persons would be participating in the diagnosis or treatment under the direction of the psychotherapist.

Subdivision (c) gives separate treatment to an examination ordered by the court to determine the criminal responsibility of an accused in a criminal proceeding. The purpose is to ensure protection against disclosure of any communication made to the examiner concerning guilt or innocence. It preserves the rule enunciated in State v. Hathaway, 161 Me. 255, 211 A.2d 558 (1965). The exception in subdivision (d)(2) excludes from its operation communications privileged under subdivision (c).

ADVISORY COMMITTEE NOTE
July 2008

This amendment would expand the coverage of the physician-psychotherapist privilege in Rule 503 to include communications between certain described mental health professionals and their patients or clients.

When various pre-existing, common-law, and statutory privileges were codified in the Rules of Evidence in 1975, the Advisory Committee and the Maine Supreme Judicial Court followed the lead of the original United States Supreme Court version of the Federal Rules of Evidence and took a relatively conservative view of the scope of the physician-psychotherapist privilege. Maine Evidence Rule 503 as originally adopted limited the evidentiary privilege to communications to or from licensed physicians (or persons reasonably believed to be such) and licensed psychologists and psychological examiners. Although then, as now, a wide variety of counseling and mental health professionals treated and consulted with clients and patients on a confidential basis, coverage of the privilege was deliberately kept relatively narrow, largely out of a concern that a broader definition might lead to evidentiary unavailability of statements rendered in a

variety of situations that could be characterized as counseling or therapeutic in one way or another.

This does not mean that there has been no protection of confidentiality for patients and mental health professionals. In many cases the statutes under which different groups of mental health professionals or counselors are licensed have imposed duties of confidentiality and have established statutory privileges for members of the licensed groups. In many cases these statutory privileges authorize disclosure by court order when necessary for the sound administration of justice.

Over the three decades since original promulgation of the Rules of Evidence the number and scope of activity of many different kinds of mental health professionals and counselors have greatly increased. There has been a frequent and often insistent call for stronger protection of the relationships of these therapists and counselors to their patients in the form of extension of the statutory privilege.

The impetus toward extension of the psychotherapist privilege beyond the traditional holders was increased by the Supreme Court decision in *Jaffee v. Redmond*, 518 U.S. 1 (1996). There the Supreme Court ruled as a matter of federal common law of evidence that communications between a clinical social worker and her patient were absolutely privileged from disclosure despite their likely relevance to the issues in a civil action. The Supreme Court applied the absolute privilege despite the existence of conditional protection under the laws of the state under which the social worker was licensed.

Today evidence rules, statutes, and common law among the American jurisdictions vary widely in the scope of the psychotherapist privilege, although it appears that the trend is toward a more expansive privilege in terms of mental health and counseling professionals covered. The Uniform Rules of Evidence have been recently amended in 1999 to include an alternative proposal extending the psychotherapist privilege to a "mental health provider," namely "a person licensed or reasonably believed by the patient so to be while engaged in the diagnosis or treatment of a mental or emotional condition including alcohol or drug addiction."

The pressure for increased coverage appears to be coming mainly from two groups: (1) various clinical social workers and licensed mental health professionals who provide therapy for mental or emotional disease including drug and alcohol addiction; (2) a broader group of professional counselors who provide various

kinds of counseling services, but who do not necessarily treat mental or emotional diseases or addictions.

The proposed amendment would extend the absolute evidentiary privilege to licensed nurse practitioners and licensed physician's assistants when treating patients. The privilege would also encompass licensed clinical social workers when treating emotional and mental conditions and four defined classes of licensed counseling professionals, "licensed professional counselors," "licensed clinical professional counselors," "licensed marriage and family therapists," and "licensed pastoral counselors," when performing their counseling functions. Valid and complete licensure would be a prerequisite for the privilege.

Clinical social workers are licensed under 32 M.R.S. §§ 7051 et seq. Of the various kinds of social workers covered by state licensing requirements, those designated and licensed as "clinical social workers"" seem best to fit the traditional role of psychotherapist as contemplated by the privilege. *See Jaffee v. Redmond, supra*.

The licensed counseling professionals proposed to be covered by the privilege are now licensed under 32 M.R.S. §§ 13851 et seq. These licensed counselors provide different forms of psychotherapy in at least some circumstances. Such professionals are currently covered by a conditional privilege which permits disclosure of client communications "when a court in the exercise of sound discretion determines the disclosure necessary to the proper administration of justice." 32 M.R.S. § 13862. The rule does not cover professionals not licensed but referred to in 32 M.R.S. § 13856.

This proposal does not cover communications to and by unlicensed mental health professionals and counselors or by persons licensed to provide specialized counseling, such as guidance counseling. The Committee is of the view that a generic definition that is not tied to some kind of clear requirement of state licensure would make the privilege administratively unworkable. For the same reason the Committee has not recommended that the privilege attach to persons "reasonably believed to be" licensed clinical social workers or licensed counselors. The privilege would extend to persons not licensed in Maine, but licensed in analogous categories with substantially similar legal requirements by other states or nations.

RULE 504. HUSBAND-WIFE PRIVILEGE

(a) Definition. A communication is confidential if it is made privately by any person to his or her spouse and is not intended for disclosure to any other person.

(b) General rule of privilege. A married person has a privilege to prevent his or her spouse from testifying as to any confidential communication from such person to the spouse.

(c) Who may claim the privilege. The privilege may be claimed by the person who made the communication or by the spouse in his or her behalf. The authority of the spouse to do so is presumed.

(d) Exceptions. There is no privilege under this rule in a proceeding in which one spouse is charged with a crime against the person or property of (1) the other, (2) a child of either, (3) any person residing in the household of either, or (4) a third person committed in the course of committing a crime against any of them; or in a civil proceeding in which the spouses are adverse parties.

ADVISERS' NOTE

This rule preserves 15 M.R.S.A. § 1315, which makes the spouse of an accused a competent witness in a criminal proceeding except in regard to "marital communications". This phrase has been § 1315, which makes the spouse construed to mean confidential communications. State v. Benner, 284 A.2d 91 (1971) (where the court assumed without deciding that the privilege comprehends conduct other than verbal exchanges). The rule also preserves the common law privilege recognized in Maine case law. Walker v. Sanborn, 46 Me. 470 (1859). The basis of the privilege was stated to be principles of public policy to preserve the peace of domestic life. It does not apply when the parties are hostile to each other and are living apart under articles of separation when the communication is made. Holyoke v. Holyoke's Estates, 110 Me. 469, 87 A. 40 (1913).

Subdivision (d) gives no privilege if one spouse is charged with a crime against the other, a child of either, any person residing in the household of either, or a third person committed in the course of committing a crime against any of them. Nor is there any privilege in civil proceedings between the parties, such as divorce. The rule appears to be consistent with Maine law, although there are some points not covered by decisions.

The rule as promulgated by the Supreme Court was markedly different. It recognized a privilege of an accused in a criminal proceeding to keep his or her spouse off the witness stand (with the exceptions later listed). It did not recognize any privilege for confidential communications between the spouses either in a criminal case, if the accused does not exercise the privilege to prevent the spouse from testifying, or in a civil action.

RULE 505. RELIGIOUS PRIVILEGE

(a) Definitions. As used in this rule:

(1) A "member of the clergy" is a minister, priest, rabbi, accredited Christian Science practitioner, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting that individual.

(2) A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) General rule of privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a member of the clergy acting as spiritual adviser.

(c) Who may claim the privilege. The privilege may be claimed by the person, by the person's guardian or conservator, or by the person's personal representative if the person is deceased. The person who was the member of the clergy at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the communicant.

ADVISERS' NOTE

There is a statutory privilege for penitential communications to clergymen. 16 M.R.S.A. § 57, added by P.L. 1965, c. 117. This rule accepts the privilege but modifies it slightly to conform to the style of the other privilege rules. The definition of clergyman is changed to include a person reasonably believed to be one by the person consulting him. The privilege protects a communication to a clergyman in his professional character as spiritual adviser but does not require, as the statute does, that it be "made in the course of the discipline or practice of the church or religious denomination or organization of which the penitent is a member." There seems to be no good reason not to include within the privilege a confidential communication made to a spiritual adviser as such even though the penitent was not a member of his church or denomination. The rule is designed to protect the confidentiality of communications on a wide variety of ethical and moral issues.

RULE 506. POLITICAL VOTE

(a) General rule of privilege. Every person has a privilege to refuse to disclose the tenor of the person's vote at a political election conducted by secret ballot.

(b) Exceptions. This privilege does not apply if the court finds that the vote was cast illegally or determines that the disclosure should be compelled pursuant to the election laws of the state.

ADVISERS' NOTE

A privilege not to disclose the tenor of one's vote appears to be universally recognized although there are no Maine cases on the point. The privilege is not applicable if the vote was cast illegally. Of course, the privilege against self incrimination would be available under appropriate circumstances.

RULE 507. TRADE SECRETS

A person has a privilege, which may be claimed by the person or the person's agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by the person, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. When disclosure is directed, the court shall take such protective measures as the interest of the holder of the privilege and of the parties and the furtherance of justice may require.

ADVISERS' NOTE

This privilege is widely recognized. No Maine case has been found, but M.R.C.P. 26(c) allows the judge in discovery proceedings to make any order which justice requires including an order "that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way." This evidence rule extends the underlying policy from the discovery stage into the trial. The difference in circumstances between the two stages may well be enough to require a different ruling at trial.

The privilege is a limited one. Patents and copyrights secure ample protection when they are obtainable. The need for protection of trade secrets without resort to public registration is relatively rare, and Wigmore says the presumption should be against their propriety. The rule allows the privilege only if it will not tend to conceal fraud or otherwise work injustice.

The last sentence of the rule gives room for judicial ingenuity in evolving protective measures to achieve some control over disclosure. Perhaps the most common is simply to take the testimony in camera.

RULE 508. SECRETS OF STATE AND OTHER OFFICIAL INFORMATION; GOVERNMENTAL PRIVILEGES

(a) Federal privilege. If the law of the United States creates a governmental privilege that the courts of this state must recognize under the Constitution of the United States, the privilege may be claimed as provided by the law of the United States.

(b) Other governmental privilege. No other governmental privilege is recognized except as created by the Constitution or statutes of this state.

(c) Effect of sustaining claim. If a claim of governmental privilege is sustained and it appears that a party is thereby deprived of material evidence, the court shall make any further orders which the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding upon an issue as to which the evidence is relevant, or dismissing the action.

ADVISERS' NOTE

Most of the problems in this field arise in federal litigation, and this rule reflects a decision to steer as clear of the problem as possible. It recognizes, as it must do, a privilege created by federal law to the extent that the Constitution requires and says that it may be claimed as provided by federal law. No other governmental privilege is recognized except as created by the Constitution or a statute of this state.

RULE 509. IDENTITY OF INFORMER

(a) Rule of privilege. The United States, a state or subdivision thereof, or any foreign country has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(b) Who may claim. The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished.

(c) Exceptions.

(1) Voluntary Disclosure; Informer a Witness. No privilege exists under this rule if the identity of the informer or the informer's interest in the subject matter of the informer's communication has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informer's own action, or if the informer appears as a witness for the state.

(2) Testimony on Relevant Issue. If it appears in the case that an informer may be able to give testimony relevant to any issue in a civil or criminal case to which a public entity is a party, and the informed public entity invokes the privilege, the court may give the public entity an opportunity to show in camera and on the record facts relevant to determining whether the informer can, in fact, supply that testimony. The showing may be in the form of affidavits, but the court may direct that testimony be taken if it finds that the matter cannot be resolved satisfactorily upon affidavit. If the court finds there is a reasonable probability that the informer can give relevant testimony, the court on motion of a party or on its own motion may enter a conditional order for appropriate relief, to be granted if the public entity elects not to disclose within the time specified the identity of such informer. In a criminal case such relief may include one or more of the following: granting the defendant additional time or a continuance, relieving the defendant from making disclosures otherwise required, prohibiting the prosecuting attorney from introducing specified evidence, and dismissing charges. In a civil case the court may provide any relief that the interests of justice require. Evidence submitted to the court shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and a docket entry shall be made specifying the form of such evidence but not its content or the identity of any declarant. The contents shall not otherwise be revealed without consent of the informed public entity. All counsel and parties are permitted to be present at every stage of proceedings under this subdivision except at a showing in camera at which only counsel for the public entity shall be permitted to be present.

ADVISERS' NOTE

The privilege of the state to refuse to disclose the identity of an informer is well settled in Maine as elsewhere. State v. Fortin, 106 Me. 382, 76 A. 896 (1910). It reflects a recognition that effective use of informers in law enforcement compels protection of their anonymity. It is only the identity of the informer that need not be revealed. The content of what he says is not privileged except to the extent necessary to conceal his identity. The reference to "any foreign country" is designed especially to preserve the privilege of Canadian police officials not to disclose the identity of an informer.

The exceptions to the privilege set forth in subdivision (c) seem entirely reasonable although there is no Maine case law dealing with them. When the informer's identity has been disclosed to "those who would have cause to resent the communication", a phrase from Roviaro v. United States, 353 U.S. 53, 60, 77 S.Ct. 623, 627 (1957), there is no longer a reason for the privilege. The same is true if the informer appears as a witness. Subsection (c)(2) is built chiefly from the

teachings of Roviaro v. United States, supra, the leading case. The informer privilege cannot be used to suppress the identity of a witness when the right of the accused to prepare his defense outweighs the public interest in protecting the flow of information. The ruse lays out a procedure for determining whether the informer can supply relevant testimony, including proceedings in camera at the state's request, with a provision for sealing and preserving evidence so as to make it available in event of an appeal. An appeal in which the appellant cannot know what the sealed evidence is poses obvious practical difficulties, but there is at least some possibility of effective review. The rule further prescribes what happens when the state elects not to disclose the informer's identity. The usual result in a criminal case would be a dismissal of the charges, but there are other options open to the court.

ADVISORY COMMITTEE NOTE
(February 1, 1983)

The procedure set forth in Rule 509(c)(2) applies when the informer may be able to give testimony relevant to any issue in a criminal case, including suppression of evidence. See State v. Chase, 439 A.2d 526 (Me. 1982).

RULE 510. WAIVER OF PRIVILEGE BY VOLUNTARY DISCLOSURE

A person upon whom these rules confer a privilege against disclosure waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged.

ADVISERS' NOTE

The proposition that a privilege is waived by voluntary disclosure is universally recognized.

RULE 511. PRIVILEGED MATTER DISCLOSED UNDER COMPULSION OR WITHOUT OPPORTUNITY TO CLAIM PRIVILEGE

A claim of privilege is not defeated by a disclosure which was (a) compelled erroneously or (b) made without opportunity to claim the privilege.

ADVISERS' NOTE

When disclosure of privileged matter has been erroneously compelled or has been made without an opportunity for the holder to claim it, the confidentiality cannot be restored. This rule gives, however, the remedy of excluding the evidence if later offered in evidence against the holder. It may be argued that the holder should stand his ground when the privilege is wrongly denied him, refuse to answer, take the consequences including a judgment of contempt, and exhaust all his legal remedies. But, in the words of the Federal Advisory Committee, "this exacts of the holder greater fortitude in the face of authority than ordinary individuals are likely to possess, and assumes unrealistically that a judicial remedy is always available." It is well settled in self-incrimination cases that a disclosure erroneously compelled cannot be used in a subsequent criminal prosecution against the holder. The principle is equally sound when applied to other privileges.

Illustrations of disclosure without opportunity to claim the privilege are disclosure by an eavesdropper, by a person used in the transmission of a privileged communication and by a person participating in group therapy under the direction of a psychotherapist. The rule deals only with disclosure of privileged matter. It does not affect the determination of what is or is not privileged. The law is in a state of flux as to whether this prohibition against disclosure of a communication from attorney to client or from one spouse to the other extends to persons who obtain knowledge of it by overhearing it either by eavesdropping or accidentally. The traditional view is that the communication is not privileged since the means of preserving secrecy are largely of the person making the communication. Wigmore, Evidence, § 2326 (attorney-client), § 2339(1) (husband-wife). The Uniform Rules of Evidence (1953) couch the attorney-client privilege so as to apply it if knowledge of the communication came to the witness in a manner not reasonably to be anticipated by the client. There are no Maine decisions on the subject. In any event, this rule is inapplicable if the matter is not privileged. If it is privileged, the holder has the right to prevent disclosure, and the evidence is inadmissible against the holder, provided, of course, that he objects when it is offered at trial.

RULE 512. COMMENT UPON OR INFERENCE FROM CLAIM OF PRIVILEGE IN CRIMINAL CASES; INSTRUCTION

(a) Comment or inference not permitted. The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel in a criminal case. No inference may be drawn therefrom.

(b) Claiming privilege without knowledge of jury. In criminal cases tried to a jury, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(c) Jury instruction. Upon request, any accused in a criminal case against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

ADVISERS' NOTE

This rule is consistent with Maine law so far as the privilege against self-incrimination is concerned. It is provided in 15 M.R.S.A. § 1315 that the fact an accused does not testify in his own behalf shall not be taken as evidence of guilt, and that the accused is entitled to an instruction to that effect. If a claim of privilege is not a proper subject for comment or inference, it follows that proceedings for making the claim should, to the extent practicable, not be conducted in the presence of the jury. It is especially important not to allow the jury to hear a claim of privilege by a nonparty witness. An inference against a party from a claim of privilege over which he has no control is clearly unfair. This is also in accord with Maine law. In State v. Robbins, 318 A.2d 51, 57 (Me. 1974), the Law Court said: "It is desirable that a witness' invocation of the privilege before the jury is to be avowed, though it is not per se prejudicial." Usually it is ascertainable in advance whether a privilege will be claimed, but unforeseen situations are bound to arise. Much must be left to the discretion of the trial judge and the professional responsibility of counsel. Since opinions will differ as to whether a jury instruction not to draw an adverse inference will be helpful or harmful, subdivision (c) leaves it to the judgment of counsel for the accused whether to request it. It is a matter of right if requested.

RULE 513. CLAIM OF PRIVILEGE IN CIVIL CASES

(a) Comment or inference permitted. The claim of a privilege by a party in a civil action or proceeding, whether in the present proceeding or upon a prior occasion, is a proper subject of comment by judge or counsel. An appropriate inference may be drawn therefrom.

(b) Claim of privilege by nonparty witness. The claim of a privilege by a nonparty witness in a civil action or proceeding shall be governed by the provisions of Rule 512.

ADVISERS' NOTE

This rule allows an adverse inference from a claim of privilege by a party in a civil case and permits comment upon it by the judge or counsel. It is not clear under Maine law whether such inference and comment are permissible. There is a suggestion in Hinds v. John Hancock Mut. Life Ins. Co., 155 Me. 349, 374, 155 A.2d 721, 735 (1959), that an inference is improper. The majority of the surprisingly few cases in other jurisdictions dealing with the question allow inference and comment. See Kaye v. Newhall, 356 Mass. 300, 249 N.E.2d 583 (1969).

Since the rule allows an adverse inference from the claim, the procedure under Rule 512 for making the claim out of the jury's hearing would be wholly inappropriate. Indeed, the failure to ask in the hearing of the jury a question to which a privilege claim could be raised might itself lead to an inference against the party who did not ask it.

Subdivision (b) recognizes the difference between a claim a party in a civil case and a claim by a nonparty witness. It treats a nonparty witness the same in a civil case as in a criminal proceeding and does not allow inference or comment.

The rules as promulgated by the Supreme Court made no distinction between civil and criminal cases and did not allow adverse comment or inference in either.

ARTICLE VI. WITNESSES

RULE 601. COMPETENCY IN GENERAL; DISQUALIFICATION

(a) General rule of competency. Every person is competent to be a witness except as otherwise provided in these rules.

(b) Disqualification of witness. A person is disqualified to be a witness if the court finds that (1) the proposed witness is incapable of communicating concerning the matter so as to be understood by the judge and jury either directly or through interpretation by one who can understand the proposed witness, (2) the proposed witness is incapable of understanding the duty of a witness to tell the truth, (3) the proposed witness lacked any reasonable ability to perceive the matter or (4) the proposed witness lacks any reasonable ability to remember the matter. An interpreter is subject to all the provisions of these rules relating to witnesses.

ADVISERS' NOTE

This rule eliminates all grounds of incompetency except those specifically recognized in the rules that follow. The only significant change is the abolition of the Dead Man's Act. 16 M.R.S.A. § l et seq. The reason behind the exclusion of a

survivor's testimony concerning a transaction of a decedent when offered against the latter's estate was that "where death has closed the mouth of one party, the law seeks to make an equality by closing the mouth of the other." Wilson v. Wilson, 157 Me. 119, 123, 170 A.2d 679, 682 (1961). The rule reflects the belief that this surviving relic of the common law disqualification of parties as witnesses leads to more miscarriages of justice than it prevents. The Act manifests the cynical view that a party will lie when he cannot be directly contradicted and the unrealistic assumption that jurors, knowing the situation, will believe anything they hear in these circumstances. It has already been eroded by exceptions. 16 M.R.S.A. § 1, exceptions 1 through 6, and most important, 16 M.R.S.A. § 59, added by P.L. 1967, c. 406, which made the disqualification inapplicable in actions for personal injury or wrongful death. This eliminated one of the most controversial aspects of the Act. This rule does away with the rest of it.

Subdivision (b) is declaratory of Maine law. State v. Brewer, 325 A.2d 26 (Me. 1974). It allows the trial judge to decide as a preliminary question whether a proposed witness is capable of expressing himself understandably and of understanding the duty to tell the truth. The trend is increasingly to resolve doubts in favor of letting the jury hear the evidence and appraise its credibility.

The Federal Rule is the same as subdivision (a) except that it provides for competency of a witness to be determined in accordance with state law in civil actions in which state law applies the rule of decision. This follows the same pattern as the Federal Rules on privilege. Subdivision (b) has no counterpart in the Federal Rule.

ADVISORY COMMITTEE NOTE
(April 1990 Amendment)

Under former Rule 601 as construed by the Law Court in State v. Hussey, 521 A.2d 278 (Me. 1987) the competency of a proposed witness is established by a finding by the trial judge that the witness (a) can express himself understandably, and (b) understands the duty to tell the truth. On appeal the trial court's finding is reviewable for clear error.

Prior to the adoption of the Rules, a trial judge's determination of the competency of a witness to testify was reviewable for abuse of discretion. Presumably if the trial judge thought under all the circumstances that the proposed witness's testimony would not be reliable, he could refuse to let him or her testify at all. Under Rule 601 as construed in Hussey, a proposed witness could be disqualified from testifying only if the trial court made the finding that the witness either could not express himself or could not understand the duty to tell the truth.

If testimonial competency is to be determined by a simple preliminary finding, the threshold requirements for testimony should include the ability to perceive and remember. Certainly perception and memory are vital to a witness's ability to bear testimony. These abilities or lack of them are often the subject matter of attacks on witness credibility. The rule as amended will screen out a witness who had no reasonable ability to perceive facts and reliably remember them. It is not intended to permit the trial judge to rule on the credibility of a witness in advance by not permitting the witness to testify.

At the time Rule 601 was enacted the Advisory Committee did not believe it was changing Maine law. The Advisor's Notes to Rule 601 as originally enacted reads:

> Subdivision (b) is declaratory of Maine law. State v. Brewer, 325 A.2d 26 (Me. 1974). It allows the trial judge to decide as a preliminary question whether a proposed witness is capable of expressing himself understandably and of understanding the duty to tell the truth. The trend is increasingly to resolve doubts in favor of letting the jury hear the evidence and appraise its credibility.

The then leading case, State v. Ranger, 149 Me. 52, 56 (1953) specifically refers to the ability to perceive and articulate in the following terms:

> The proposed child witness should know the difference between truth and falsehood, and apparently must be able to receive accurate impressions of facts, and be able to relate truly the impressions received. The child witness should have sufficient capacity to understand, in some measure, the obligation of an oath; or to realize that it is wrong to falsify, and that if he does tell an untruth he is likely to be punished.

Although Rule 601 applies to all witnesses, it will be most frequently applied to children as proffered witnesses. The younger the potential witness, the more conscious should be the inquiry into whether the witness is able to perceive and relate sufficiently reliably so as to be a conduit for information into the courtroom.

Although the trial court may generally conduct voir dire on the competence of a witness outside the presence of the jury, that should not preclude a party from addressing the credibility and weight of the witness' testimony by similar questions on cross examination.

The proposed amendment deletes the reference to interpreters from Rule 601. Interpreters are specifically regulated by Rule 604.

RULE 602. LACK OF PERSONAL KNOWLEDGE

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

ADVISERS' NOTE

This rule is universally accepted. The burden of laying a foundation that the witness had an adequate opportunity to observe is on the proponent of the testimony. By failing to object the opponent waives the preliminary proof but not the substance of the requirement. If it later appears that the witness did not actually observe a fact as to which he testified, the testimony will be stricken on motion. The reference to Rule 703 is designed to avoid any possibility of conflict between this rule and the rule allowing an expert to express opinions based on facts of which he does not have personal knowledge.

RULE 603. OATH OR AFFIRMATION

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the witness's duty to do so.

ADVISERS' NOTE

This rule is in accord with Maine law 16 M.R.S.A. § 55 (no incompetency on account of religious belief; atheist may testify under solemn affirmation and is subject to pains and penalties of perjury); 1 M.R.S.A. § 72(l) (a person conscientiously scrupulous of taking an oath may affirm).

RULE 604. INTERPRETERS

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.

ADVISERS' NOTE

This rule implements M.R.C.P. 43(1) and M.R. Crim. P. 28(b), both of which provide for the appointment and compensation of interpreters.

RULE 605. COMPETENCY OF JUDGE AS WITNESS

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

ADVISERS' NOTE

This broad rule of a judge's incompetency as a witness in a trial at which he is presiding is plainly sound if the highly unlikely occasion for its use should arise. The automatic objection in the last sentence makes an actual objection unnecessary so that an objector's rights are preserved without the possible risk of antagonizing the judge before whom the trial would continue.

RULE 606. COMPETENCY OF JUROR AS WITNESS

(a) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If a juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning any juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the

juror concerning a matter about which the juror would be precluded from testifying be received.

ADVISERS' NOTE

Subdivision (a) is based upon considerations similar to the rule declaring the trial judge to be incompetent as a witness.

Subdivision (b) is in accord with Maine law. Patterson v. Rossignol, 245 A.2d 852 (Me. 1968).

RULE 607. WHO MAY IMPEACH

The credibility of a witness may be attacked by any party, including the party calling the witness.

ADVISERS' NOTE

This rule departs from traditional Maine practice. State v. Fournier, 267 A.2d 638 (Me. 1970). The policy reason for not allowing a party to impeach a witness he has called was that he vouches for the credibility of his own witnesses. This is unrealistic since a party does not have a free choice in selecting witnesses. There has been a recent trend to abandon the old rule either by statute or, occasionally, by judicial decision. It is widely supported by the commentators. This rule goes along with that trend.

Under present law a party who is surprised by unfavorable testimony may inquire about prior contradictory statements. Hartford Fire Ins. Co. v. Stevens, 123 Me. 368, 123 A. 38 (1924). Such contradictory statements may be used, however, only for impeachment and not as affirmative evidence. This rule provides an effective weapon for dealing with a turncoat witness who changes his story and deprives the party calling him of essential testimony. Under Rule 801(d)(1) the prior statement, if under oath, can be used as substantive evidence of its truth, as will be explained in the Note to that rule.

RULE 608. EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS

(a) Reputation evidence of character. The credibility of a witness may be attacked or supported by evidence of reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and

(2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence or otherwise.

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness's character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness's privilege against self-incrimination when examined with respect to matters which relate only to credibility.

ADVISERS' NOTE

In allowing reputation evidence of the character of a witness, this rule is consistent with Rule 405(a). The limitation confining this evidence to character for veracity instead of evidence of character generally is in accord with the weight of authority. It avoids surprise, waste of time, and confusion and makes the task of being a witness somewhat less unpleasant. Allowing character evidence in support of the credibility of a witness only after his character has been attacked is a limitation imposed at common law. It saves an enormous amount of time.

Subdivision (b) gives the court discretion to allow inquiry on cross-examination into specific instances of conduct bearing upon the credibility of a witness. It is in accord with Maine law. State v. Whitehead, 151 Me. 135, 116 A.2d 618 (1955).

It is unclear whether limiting cross-examination to matters probative of truthfulness or untruthfulness changes Maine law. It does not seem to be spelled out in Maine cases and the rule in other jurisdictions varies. In any event, the limitation seems a reasonable one.

RULE 609. IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

(a) General rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a specific crime is admissible but only if the crime (1) was punishable by death or imprisonment for one year or more under the law under which the witness was convicted, or (2) involved

dishonesty or false statement, regardless of the punishment. In either case admissibility shall depend upon a determination by the court that the probative value of this evidence on witness credibility outweighs any unfair prejudice to a criminal defendant or to any civil party.

(b) Time limit. Evidence of a conviction under this rule is admissible only if less than 15 years have transpired since said conviction or less than 10 years have transpired since termination of any incarceration period therefor.

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure.

(d) Juvenile adjudications. Evidence of a juvenile adjudication in a proceeding open to the public may be admitted under this rule. Evidence of a juvenile adjudication in a proceeding from which the public was excluded may be admitted under this rule only in another juvenile proceeding from which the public is excluded.

ADVISERS' NOTE

Subdivision (a), in making conviction of a crime admissible if punishable by imprisonment for one year or more, is essentially the same as 16 M.R.S.A. § 56, as amended by P.L. 1973, c. 295, which speaks in terms of "conviction of a felony". Under Maine law any crime that may be punished by imprisonment for one year or more is a felony. "May be punished" means "punishable"; the punishment that may be imposed, not that which is imposed, determines whether or not the offense is a felony. Smith v. State, 145 Me. 313, 326, 75 A.2d 538, 545 (1950). The sentence actually imposed governs whether imprisonment shall be in the State Prison. 15 M.R.S.A. § 1703. Since the rule permits the use of convictions in other states, where the distinction between felonies and misdemeanors may no longer prevail, it is preferable to speak in terms of the duration of possible punishment. Cf. proposed Maine Criminal Code, 107th Legislature, L.D. 314. If the crime involved dishonesty or false statement, the evidence is admissible regardless of the punishment. This approximates the provision of 16 M.R.S.A. § 56 which allows evidence of a conviction for "any larceny or any other crime involving moral turpitude". It has the advantage of avoiding the latter troublesome phrase. See State v. Jenness, 143 Me. 380, 62 A.2d 867 (1948); State v. Peaslee, 287 A.2d 588 (Me. 1972). The subdivision includes a discretionary factor, taken from the Federal Rule, under which the court will exclude the evidence unless it determines that its probative value outweighs its prejudicial effect.

Subdivision (1b) preserves the time limitations of the statute which exclude evidence of convictions deemed to be too old to warrant admission. Subdivision (c) renders inadmissible convictions which have been the subject of a pardon, annulment or certificate of rehabilitation. The latter two are included although unknown to Maine practice because convictions in other states come within the rule. Subdivision (d), making juvenile adjudications inadmissible, is in accord with 15 M.R.S.A. § 2606.

The rule in subdivision (a) follows the Federal Rule closely. The Federal Rule has the trivial difference of using the phrase "in excess of one year" rather than "one year or more". It also limits the discretionary factor to crimes set forth in clause (1) rather than applying to the entire subdivision. It further includes in subdivision (b) an additional discretionary factor which may in the interests of justice permit the showing of a conviction older than the normal time limits allow (ten years in the Federal Rule).

There is also a provision in subdivision (a) of the Federal Rule that evidence of a conviction "shall be admitted if elicited from him or established by public record during cross-examination". This appears to produce a result Congress could not have intended. It is plain that, as under present law, a witness can be asked if he is the so-and-so who on a stated date was convicted of the crime of such-and-such. If the answer is yes, there is no problem. If it is no, the state is put to its proof. It must not only have a certified copy of the conviction but a person who can identify the witness as the person convicted. This cannot be done "during cross-examination", as the rule seems to require, except perhaps by suspending the cross-examination and putting on the identifying witness. This might be deemed to be "during cross-examination". Nothing but harm and confusion could come from including this clause.

Subdivision (c) of the Federal Rule makes a conviction the subject of a pardon and the like inadmissible only if based on a finding of either rehabilitation or innocence. This is inappropriate, for Maine at least, because ordinarily the reason for a pardon is not a matter of record.

Subdivision (d) of the Federal Rule departs from this rule by allowing in a criminal case evidence of a juvenile adjudication of a witness other than the accused if it would be admissible to attack the credibility of an adult and the court makes the finding that its admission is necessary for a fair determination, thus attempting to balance the harm to the juvenile against the gain in the fair administration of justice.

The Federal Rule has a subdivision (e), which allows a conviction to be shown despite the pendency of an appeal.

1978 AMENDMENT NOTE
(April 6, 1978)

This amendment replaced the word "and" in Rule 609(b) of the Maine Rules of Evidence as originally promulgated with the word "or". In its order adopting the amendment, the Supreme Judicial Court stated:

> The Court had dispensed with the requirements for notice and opportunity to comment on the ground that the public interest so requires because unless it is amended the rule reaches an unintended and unreasonable result.

ADVISORY COMMITTEE NOTE
(January 31, 1985 Amendment)

Subsection (d) makes evidence of a juvenile adjudication generally admissible under Rule 609 only if the adjudication results from a proceeding open to the public. See 15 M.R.S.A. § 3307(2)(A). Otherwise, such adjudications are admissible under this rule only in other nonpublic juvenile cases.

ADVISERS' NOTE
(April 16, 1990 Amendment)

The foregoing amendment [adding the references to witness credibility and to the criminal defendant or any civil party] is for the purpose of further stressing that the only legitimate basis for admission of a prior criminal conviction under this rule is the inference that a person convicted of crime or of specific kinds of crimes might not be truthful in testimony. The rule does not support or permit the admission of prior convictions to sustain an inference of substantive guilt, innocence or liability with respect to any issue in the case.

The amendment also makes it clear that before admitting a criminal conviction of any witness under this provision, the court must balance the probative value of the conviction on the credibility of the witness against any unfair prejudice to a criminal defendant or any civil party. The state in a criminal case is not entitled to the protection of the balancing test contained in Rule 609. However if the danger of unfair prejudice, confusion of the issues, misleading the jury or waste of time substantially outweighs the probative value of a proffered conviction, it can be excluded under Rule 403 on motion of any party, including the prosecution.

The rule is applied most often to protect a criminal defendant who testifies in his own behalf. It also is designed to screen out unfair prejudice in civil cases. In each case the proffered conviction must qualify as to type under paragraph a) and recency under paragraph b). The trial judge must then weigh the probative value of the particular conviction offered on the credibility as a witness of the person convicted against the unfair prejudice from other inferences that may be drawn from the conviction or any emotional reaction evoked by it.

One instance in which the Court should give particular consideration to the risk of unfair prejudice is where a criminal defendant would be impeached with a prior conviction so similar to the offense charged that the jury might draw the improper inference that the defendant merely repeated prior criminal conduct. Prior convictions for sex offenses tend to evoke strong emotional reactions. Such convictions could be excluded under this rule. Convictions of offenses which have little probative force on testimonial credibility would be subject to exclusion on a lesser showing of unfair prejudice than convictions of offenses highly relevant to a witness' truthfulness on the stand.

Frequently the determination of the admissibility of convictions under this rule is crucial to the defendant's election to testify in his own behalf. In many cases this election will affect the entire trial strategy of the defense. The trial court should generally entertain a motion in limine to determine the admissibility of any prior convictions of the defendant before the trial or, at the latest, before the opening statements. See, State v. Pottios, 564 A.2d 64, fn. 1 (Me. 1989). If examining counsel has any question about the admissibility of a prior conviction under this rule, opposing counsel should be given an opportunity to object before the question is posed in front of the jury.

ADVISORY COMMITTEE NOTE
(June 1, 1992 Amendment)

The purpose of adding the word "specific" in Rule 609(a) is to make it clear that evidence that is admissible under this rule is evidence of a specific crime, not a generic "serious" crime, "felony," "misdemeanor" or other substitute. This requires the trial court to balance the potential of unfair prejudice from evidence of the specific crime of which the witness was convicted against the probative value of evidence of conviction of that crime on issues of credibility.

To permit evidence of a generic "serious crime," "felony" or other substitute would permit the jury to speculate about the crime of which the witness was convicted and perhaps draw inferences, which could be unfair to the witness.

RULE 610. RELIGIOUS BELIEFS OR OPINIONS

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness's credibility is impaired or enhanced.

ADVISERS' NOTE

This rule is directly contrary to 16 M.R.S.A. § 55, which allows a person's religious belief to be shown to affect his credibility. The statute traces back to P.L. 1847, c. 34, which was a substitute for P.L. 1833, c. 58. The earlier statute made a person who did not believe in a Supreme Being incompetent as a witness. In doing away with the incompetency rule the legislature made the concession with respect to impeachment. The present statute is in fact a dead letter and it should be done away with.

RULE 611. MODE AND ORDER OF INTERROGATION AND PRESENTATION

(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence on direct and cross-examination so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination. A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. In the interests of justice, the judge may limit cross-examination with respect to matters not testified to on direct examination.

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony. Ordinarily leading questions should be permitted on cross-examination. A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of the state or any political subdivision thereof or of a public or private corporation or of an association or body politic which is an adverse party, and interrogate such a witness by leading questions and contradict and impeach the witness in all respects as if the witness had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of the witness's examination in chief. A witness examined in chief only as to the

signature to or execution of a paper may be cross-examined only as to such signature or execution.

ADVISERS' NOTE

This rule states Maine law. It preserves the wide-open rule permitting cross-examination on any issue in the case, subject to a discretionary right to limit it in the interests of justice. Falmouth v. Windham, 63 Me. 44 (1873). The trial of a multi-count indictment might present a suitable occasion for exercising a discretionary limitation. The reference to "direct and cross-examination" is designed to emphasize the scope of the court's control over the order of proof. This rule is contrary to that in the federal courts and many state courts which limits cross-examination to the subject matter of the direct examination. The Federal Rule retains the traditional federal view limiting cross-examination to the scope of the direct.

Subdivision (c) incorporates the rule laid down in M.R.C.P. 43(b) on examination of hostile witnesses. The third sentence of the Federal Rule reads: "When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions." This rule has a greater degree of precision.

This subdivision in merely stating that leading questions should not be used on direct examination except as may be necessary to develop the testimony lacks the precision of most of the rules. In taking it from the Federal Rule the Court was aware of this imprecision but concluded that it was unwise to set out all the exceptions to the rule against leading questions that came to mind. In practice objection on this ground is rarely made to preliminary stage-setting questions and is given short shrift if it is made. Leading questions when the memory of the witness has been exhausted are permissible as "necessary to develop his testimony." In short, the generalization that leading questions "should not be used" (not, it is to be noted, a flat prohibition of the use) is not to be taken as changing the areas where leading has traditionally been permitted.

RULE 612. WRITING OR OBJECT USED TO REFRESH MEMORY

(a) While testifying. If, while testifying, a witness uses a writing or object to refresh the witness's memory, an adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying.

(b) Before testifying. If, before testifying, a witness uses a writing or object to refresh the witness's memory for the purpose of testifying and the court in its discretion determines that the interests of justice so require, an adverse party is entitled to have the writing or object produced, if practicable, at the trial, hearing, or deposition in which the witness is testifying.

(c) Terms and conditions of production and use. A party entitled to have a writing or object produced under this rule is entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If production of the writing or object at the trial, hearing, or deposition is impracticable, the court may order it made available for inspection. If it is claimed that the writing or object contains matters not related to the subject matter of the testimony the court shall examine the writing or object in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing or object is not produced, made available for inspection, or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the state elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

ADVISERS' NOTE

Subdivision (a) deals with refreshing the recollection of a witness while testifying, as is presently permitted under Maine law. Cope v. Sevigny, 289 A.2d 682 (Me. 1972).

Subdivision (b) gives the court a discretionary power in the interests of justice to require production of a writing used by a witness to refresh his memory before testifying. There appears to be no precedent for this in Maine case law but it should be an aid to bringing out the truth.

Subdivision (c) covers the terms and conditions of production and use of a writing produced under the rule. The reference to the preservation for appeal of portions of a writing excised after examination in camera is derived from 18 U.S.C. § 3500 (the Jencks Act). There appear to be no reported federal cases dealing with such an appeal.

The Federal Rule is different in wording but not greatly different as a substantive matter. It does not include "object" as well as "writing". This rule, following the Uniform State Law, is a clearer statement.

RULE 613. PRIOR STATEMENTS OF WITNESS

In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

ADVISERS' NOTE

This rule abolishes the old English requirement under which a cross-examiner before questioning a witness about his own prior written statement must first show it to the witness. It was changed by statute in England long ago but is still widely followed in this country. There is no reported decision in Maine either accepting or rejecting the rule, but in day-to-day practice in the trial courts it is not required. It is obvious that cross-examination may be more effective if the witness is not given a chance to see his statement before committing himself. The provision for disclosure on request to opposing counsel is to prevent unwarranted insinuations that a statement has been made when the fact is to the contrary.

The Federal Rule includes a subdivision (b) barring extrinsic evidence of a prior inconsistent statement unless the witness has been given an opportunity to explain or deny it. This is the general rule but the Maine practice has been to the contrary since Ware v. Ware, 8 Me. 42 (1931). See Currier v. Bangor Ry. & Elec. Co., 119 Me. 313, 111 A. 333 (1920). Often counsel decides as a matter of tactics to confront the witness with the statement, but it has not been compulsory. No such requirement is included because the prevailing practice has worked well.

RULE 614. CALLING AND INTERROGATION OF WITNESSES BY COURT

(a) Calling by court. The court may, on its own motion when necessary in the interests of justice or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) Interrogation by court. The court may interrogate witnesses, whether called by itself or by a party.

(c) Objections. Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity out of the hearing of the jury.

ADVISERS' NOTE

This rule is consistent with Maine law. State v. Dupuis, 159 Me. 100, 188 A.2d 688 (1963) (judge may, after state rests, recall witness for purpose of eliciting basis of stated conclusions previously given without objection); State v. Haycock, 296 A.2d 489 (Me. 1972) (judge may interrogate witness so long as he does not assume posture of advocate or retreat from position of judicial impartiality); State v. Hunnewell, 334 A.2d 510 (Me. 1975) (to the same effect).

Subdivision (c) gives an opportunity to object to the judge's conduct without the embarrassment of doing so in the hearing of the jury. A bench conference which the jury can observe but not hear is a compliance with the rule. "Next available opportunity" is to be interpreted reasonably. An instant demand for a bench conference is not required, but the delay should not be protracted.

Although the rule recognizes the power of the court to call a witness on its own motion, the use of the words `when necessary in the interests of justice' is designed to emphasize that the power ought to be exercised very rarely, especially in criminal cases. A situation may occasionally arise where the prosecution, or possibly the defense, discloses to the court that a witness it is unwilling to sponsor could offer highly relevant testimony. A request that this witness be called as the court's witness and all parties be free to cross-examine might well be granted. This is quite different from the court's calling a witness without a suggestion of either prosecution or defense on the basis of the court's own knowledge or investigation.

The Federal Rule does not include "when necessary in the interests of justice" in subdivision (a) and in subdivision (c) reads "when the jury is not present".

RULE 615. EXCLUSION OF WITNESSES

At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

ADVISERS' NOTE

This rule makes exclusion of witnesses from the courtroom while other witnesses are testifying wholly discretionary, reversible only for abuse. State v. Miller, 253 A.2d 58 (Me. 1969). In practice the court routinely grants a request for exclusion. The Federal Rule makes exclusion mandatory on request.

RULE 616. ILLUSTRATIVE AIDS

(a) Subject to the provisions hereof, depictions and objects not admissible in evidence may be used to illustrate the testimony of witnesses or the arguments of counsel.

(b) The court in its discretion may condition, restrict or exclude the use of any illustrative aid to avoid the risk of unfair prejudice, surprise, confusion or waste of time.

(c) Consistent with the constitutional rights of criminal defendants, illustrative aids prepared before use shall be disclosed to opposing counsel before use so as to permit reasonable opportunity for objection under Subsection (b).

(d) Illustrative aids shall not accompany the jury during deliberations unless by consent of all parties or order of court on good cause shown.

(e) Illustrative aids shall remain the property of the party proposing them providing that:

i. during the trial they may be used by any party; and

ii. on request of any party they shall be preserved for the record of further proceedings or on appeal.

ADVISORY COMMITTEE NOTE

This rule is intended to authorize and regulate the use of "illustrative aids" during trial.

Objects, including papers, drawings, diagrams, the blackboard and the like which are used during the trial to provide information to the finder of fact can be classified in two categories. The first category, admissible exhibits, are those objects, papers, etc., which in themselves have probative force on the issues in the case and hence are relevant under Rule 401. Such objects are admissible in evidence upon laying the foundation necessary to establish authenticity and relevancy and to avoid the strictures of the hearsay rule and other evidentiary screens. Usually the jury is permitted to take these objects with them to the jury room, to study them and to draw inferences directly from them relating to the issues in the case.

The second class of objects are those objects which do not carry probative force in themselves, but are used to assist in the communication of facts by a lay or expert witness testifying or by counsel arguing. These may include blackboard drawings, pre-prepared drawings, video recreations, charts, graphs, computer simulations, etc. They are not admissible in evidence because they themselves have no relevance to the issues in the case. Their utility lies in their ability to convey

relevant information which must be provided directly from some actual evidentiary source, whether that source be witness or exhibit which is admissible in evidence. The ultimate credibility and scope of the information conveyed is that of the source, not that of the illustrative media.

This latter group of objects can be referred to as "illustrative aids." Sometimes they have been referred to as "demonstrative exhibits" or even "chalks."

Frequently voluminous evidentiary data is summarized in tabular, or even graphic form, and is offered as a summary under Rule 1006. A summary which presents the data substantially in its original form would be admissible in evidence. A summary which presents the data in a tabular or graphic form to "argue" the case or support specific inferences would be an illustrative aid and would be governed by this rule.

While such aids do not have evidentiary force in themselves, they can be extremely helpful in assisting the trier of fact to visualize evidentiary material which is otherwise difficult to understand. For the same reason, illustrative aids can also be subject to abuse. Sometimes the form of the illustrative may be grossly or subtly distorted to "improve" upon the underlying testimony, to oversimplify, or to provide subliminal messages. The opportunity for inventiveness and creativity in illustrative aids may exaggerate the effect of disparities in financial resources between parties.

The proposed rule addresses some of the most common issues associated with the use of illustrative aids.

First of all, Rule 616(a) permits the use of illustrative aids for the purpose of illustrating the testimony of witnesses or the arguments of counsel. In the case of witness testimony, the foundation for the use of an illustrative aid would be testimony to the effect that the aid would assist the witness in illustrating her testimony. It is clear that the object need not be admissible in evidence to be useful as an illustrative aid. Thus there is no need to establish the authenticity of an illustrative aid or even its accuracy as long as it has no probative force beyond that of illustrating a witness's testimony.

Paragraph (b) of the proposed rule makes clear, however, that the court retains the discretion to condition, restrict or exclude the use of any illustrative aid in order to avoid the risk of unfair prejudice, surprise, confusion or waste of time. This is similar to the discretion exercised by the court under Rule 403 in dealing with objects which are admissible in evidence. Because of the multiplicity of potential problems which may be encountered, it is deemed wiser to allow the court a measure of discretion in applying general standards rather than to establish a legal test for utilization of these media.

Some of the problems associated with the use of illustrative aids can include the following:

1. Cases where the illustrative aid is so crafted as to have probative force of its own. Few people would attribute much probative force to a blackboard drawing which is used to illustrate a witness's testimony. However, with a precisely drawn chart, or even more a computer video display, the perceived quality of the media may impart to the information conveyed a degree of authority, accuracy and credibility much greater than the source from which the information originally came. If the court finds that the use of illustrative aids results in a "dressing up" of testimony to a level of perceived dignity, accuracy or quality greater than it deserves and this works an unfair prejudice, the aid could be limited or excluded under Rule 616(a).

2. Sometimes illustrative aids are used to take advantage of and heighten a disparity in economic resources. The entertainment quality of certain media may give an edge to a wealthy litigant which is entirely unjustified by the actual facts.

3. There is risk that the jury may draw inferences from the illustrative aids different from those for which the illustrative aid was created and offered. This is especially likely to be a risk if the jury takes the aids with them in the jury room to experiment with or scrutinize.

4. Use of illustrative aids often makes a more informative visual presentation which is difficult to capture on an oral record. Problems of ownership and control of the aids may make it impossible to document in the transcript a meaningful record on appeal.

5. Ordinary discovery procedures concentrate on the actual information possessed by the witnesses and known exhibits. Illustrative aids as such are not usually subject to discovery and often are not prepared far enough in advance of trial. Their sudden appearance at trial may not give sufficient opportunity for analysis, particularly if they are complex, and may cause unfair surprise.

Illustrative aids may themselves become issues in the case leading to waste of time quibbling over the fairness of the illustrative aid, or battles between opponents marking up each other's illustrative aid, and the like.

One of the primary means of safeguarding and regulating the use of the illustrative aids is to require advance disclosure. The rules proposes that illustrative aids prepared before use in court be disclosed prior to use so as to permit reasonable opportunity for objection. The rule applies to aids prepared before trial or during trial before actual use in the courtroom. Of course, this would not prevent counsel from using the blackboard or otherwise creating illustrative aids right in the courtroom.

"Reasonable opportunity" for objection means reasonable under the circumstances. In a case where the aid is simple and is generated shortly before or even during trial, disclosure immediately before use would allow reasonable opportunity for the opponent to check out the aid. On the other hand counsel proposing to use a computer simulation or other complex illustrative media should be expected to make the aid and any information necessary to check its accuracy available sufficiently far in advance of use so as to permit a realistic appraisal and understanding of the proposed aid. The idea is to permit opposing counsel the opportunity to raise any issues of fairness or prejudice with the court out of the presence of the jury and before the jury may have been tainted by the use of the illustrative aid. This requirement of prior disclosure should be applied to both prosecution and defense in criminal cases consistent with constitutional rights of criminal defendants. The rule also provides that illustrative aids are not to go to the jury room unless all parties agree or unless the court orders. In many cases, it is likely that the parties will agree that certain illustrative aids might go to the jury room to aid the jury in their understanding of the issues. In other cases, it is possible that, despite the protest of one party, the court may determine that the jury's consideration of the issues might be so aided by an illustrative aid used during the trial that it should go with the jury to the jury room. But in the absence of such agreement or specific order, the residual rule would be that illustrative aids may be used in the courtroom only.

A recurrent problem with the use of illustrative aids arises from the fact that these are often proprietary items prepared by a particular party to give that party an advantage in the courtroom presentation. However, when a witness has relied heavily on an illustrative aid in giving her testimony, it is often impossible to cross-examine that witness effectively without the use of the same illustrative aid. Similarly, if an illustrative aid has been important in the presentation of one side, the other side ought to have access to that illustrative aid in meeting the testimony illustrated. "Use" of an illustrative aid does not mean despoiling it. Mutual courtesy and respect, reinforced if necessary by court supervision and aided by mylar overlays and the like, should suffice to preserve each party's illustrative aids from detracting markings by opposing counsel or witnesses.

The authorization here provided for the use of non-admissible "illustrative aids" does not prevent a party from using an actual probative exhibit also as an illustrative aid. For instance, a witness might be asked to indicate by marking on a photograph the location of an object which was not present at the time the photograph was taken. The photograph, as an exhibit, would be probative in itself. The jury could draw inferences directly from it. But the marks added by the witnesses would be a visual form of witness testimony. The preservation of that particular testimony in visual form for later inspection by the jury during

deliberations might give that testimony undue weight and durability under the circumstances. Thus the court would have the discretion under this rule to withhold from the jury room an exhibit to which illustrative markings had been added if the markings would give undue weight to a witness's testimony on a disputed issue or otherwise would have some unfairly prejudicial effect.

The court would also have the discretion under this rule to restrict or prohibit marking on an evidentiary exhibit if the effect would be to remove the exhibit from the jury room during deliberations. Thus, if a counsel wishes to mark or to enhance an admitted exhibit or add additional material as an illustrative aid, it probably should be done on another counterpart of the exhibit or with a mylar overlay or some other suitable removable means so that the exhibit could be considered in the jury room in its original state.

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

RULE 701. OPINION TESTIMONY BY LAY WITNESSES

If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

ADVISERS' NOTE

This rule is declaratory of Maine law. Clause (a) is the familiar requirement of firsthand knowledge or observation. See, e.g., Wiles v. Connor Coal & Wood Co., 143 Me. 250, 60 A.2d 786 (1948) (estimate of speed inadmissible when no adequate opportunity to observe). Clause (b) limits testimony in the form of opinions or inferences to those helpful in resolving issues. Often the only way to convey what the witness observed is in the form of opinion or inference. Speed is an obvious example; identity is another. Courts admit such testimony out of necessity, often referring to it as a "short-hand rendering of facts." Stacy v. Portland Publishing Co., 68 Me. 279, 285 (1878). The opinion or inference of a witness is not "helpful" under this provision if relating what he observed would put the jury in the position to come to its own conclusion. Hence such an opinion would be rejected.

RULE 702.
TESTIMONY BY EXPERTS

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

ADVISERS' NOTE

This rule is also declaratory of Maine law. The concluding phrase allowing the expert to testify "in the form of an opinion or otherwise" is designed to allow an expert to give an exposition of relevant scientific or other principles in the form of statements of fact. Cf. State v. Thomas, 299 A.2d 919 (Me. 1973) (objection to expert's testimony "presented as a statement of fact" as opposed to being "only an opinion and not an observed fact" overruled; "a hypertechnical exercise in semantics", said the court).

RULE 703. BASIS OF OPINION TESTIMONY BY EXPERTS

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

ADVISERS' NOTE

An expert may base his opinion (1) on firsthand observation, as by a physician treating a patient; (2) on presentation at the trial, as by the familiar hypothetical question or by having the expert attend the trial and hear the testimony establishing the facts relied on; or (3) presentation of data to the expert outside of court and other than by his own direct perception. The key provision is the final sentence allowing opinion on facts or data not admissible in evidence. This is supported by Warren v. Waterville Urban Renewal Authority, 235 A.2d 295 (Me. 1967), although there are earlier cases looking the other way. The plain intention of the rule is to bring judicial practice into line with the practice of experts themselves when not in court. For example, a physician in his own practice bases his diagnosis on information from a variety of sources such as hospital records, X-ray reports, statements by patients, and reports from nurses and technicians. Most of these could be presented in the form of admissible evidence, but only through a time-consuming process of authentication. The test is whether

the facts or data are of a type reasonably relied upon by experts. As the Federal Advisory Committee said: "The physician makes life-and-death decisions in reliance upon them. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes."

The question whether facts or data are of a type reasonably relied upon is a preliminary one for the court. A statement by the witness that he, or experts generally, found facts or data of a given type reliable in forming an opinion is not controlling upon the court. The Federal Advisory Committee, to allay the fear that enlargement of permissible data might break down the rules of exclusion unduly, stressed the reasonable reliance requirement and gave the opinion of an "accidentologist" as to the point of impact based on statements of bystanders as an example of a situation where it was not satisfied.

RULE 704. OPINION ON ULTIMATE ISSUE

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

ADVISERS' NOTE

The old rule, here abolished, forbidding an opinion on an ultimate issue to be decided by the jury has been in growing disfavor in recent years. This does not lower the bars to admit all such opinions. Under Rules 701 and 702 opinions must be helpful to the trier of fact and Rule 403 provides for exclusion of time-wasting evidence. A lay opinion, for example, that the defendant was negligent would surely be rejected.

RULE 705. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION

(a) Disclosure of Underlying Facts. The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

(b) Objection. An adverse party may object to the testimony of an expert on the ground that the expert does not have a sufficient basis for expressing an opinion. Counsel may before the witness gives an opinion be allowed to conduct in the absence of the jury a voir dire examination directed to the underlying facts or

data on which the opinion is based. If a prima facie case is made that the expert does not have sufficient basis for the expert's opinion, the opinion is inadmissible unless the party offering the testimony first establishes the underlying facts or data.

ADVISERS' NOTE

Subdivision (a) is designed to eliminate the necessity of a hypothetical question in eliciting expert testimony. Wigmore has said: "The hypothetical question, misused by the clumsy and abused by the clever, has in practice led to intolerable obstruction of truth." 2 Wigmore, Evidence § 686. The remedy is to allow the opinion to be given without prior disclosure of the underlying facts or data. The provision that prior disclosure of the underlying facts is not required does not mean that the expert is forbidden to disclose them on direct examination. The rule permits him to do so, even though facts not admissible in evidence may be included, as Rule 703 allows. The rule supersedes statements to the contrary in Warren v. Waterville Urban Renewal Authority, 235 A.2d 295 (Me. 1967).

The court has discretion to require prior disclosure of the underlying facts, either on an objection that an inadequate foundation has been laid or for other reasons. In any event disclosure may be required on cross-examination. Tactically, of course, a party may prefer to disclose these facts on direct examination.

Subdivision (b) reflects the awareness that a potential for serious abuse exists in the use of the technique permitted in subdivision (a). An expert may predicate his opinion on unreliable data and its weakness may not be revealed on direct examination. This may put the adverse party at a tactical disadvantage, forcing him to engage in blind cross-examination. Moreover, once the opinion is heard by the jury, it may well be that nothing done on cross-examination or by the court can eliminate the resulting prejudice. In civil cases if counsel has engaged in the pretrial discovery permitted by M.R.C.P. 26(b)(4), he should be equipped to challenge the basis of the opinion. This subdivision allows the alternative, however, of a voir dire examination before the opinion is admitted, so as to give a basis for its exclusion in an appropriate case.

ADVISORY COMMITTEE NOTE
(February 15, 1993 Amendment)

This amendment merely clarifies the language of Rule 705(a) that the disclosure of underlying facts referred to by the rule is disclosure in prior testimony in court, not pretrial disclosure during the course of discovery. The rule permitting an expert to give an opinion without first testifying to the underlying

facts and data is not intended to limit or define the scope of required or permitted pretrial discovery of expert testimony.

RULE 706. COURT APPOINTED EXPERTS

(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the expert consents to act. A witness so appointed shall be informed of the witness's duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness's findings, if any; the witness's deposition may be taken by any party; and the witness may be called to testify by the court or any party. Such a witness shall be subject to cross-examination by each party, including a party calling the witness.

(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. Except as otherwise provided by law, the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) Parties' experts of own selection. Nothing in this rule limits the parties in calling witnesses of their own selection.

ADVISERS' NOTE

Court-appointed experts are provided for in M.R. Crim. P. 28(a). There is no broad statutory provision or rule for such appointments in civil cases. Under 19 M.R.S.A. §§ 277-279, added by P.L. 1967, c. 325, § 2, the court may in paternity cases appoint qualified experts to perform blood tests. The experts are to be called as court witnesses, subject to cross-examination, and to be paid as the court orders. This rule generalizes the procedures under the statute.

This rule is identical to the Federal Rule. Although it recognizes that the power of the trial judge to appoint an expert of his own choosing should exist, the Court shares the view of the Advisory Committee that exercise of power in civil cases should be resorted to only in exceptional situations. The Committee said: "In

any jury case the opinion of an expert known to be court-appointed and hence presumably impartial would almost surely be given decisive weight. In a case tried without jury the judge who selected the expert could scarcely be expected by the parties not to adopt his opinion. The use of a court-appointed expert in personal injury cases seems especially unwise. The Committee recommends the rule in this form because it could not devise any satisfactory limitation to prevent potential abuse."

ARTICLE VIII. HEARSAY

RULE 801. DEFINITIONS

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if:

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the witness's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding, or in a deposition; or (B) one of identification of a person made after perceiving the person. A prior consistent statement by the declarant, whether or not under oath, is admissible only to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, but not to the principal or employer himself, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, but not to the principal or employer, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered, but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the

participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

ADVISERS' NOTE

The definitions in this rule pose some problems and bring about some changes in Maine law. Subdivision (a) excludes from the operation of the hearsay rule all evidence of conduct not intended as an assertion. In addition to verbal assertions, "statement" includes nonverbal conduct, such as pointing at someone, which is assertive in nature. ("That's the man!") When an assertion is intended is a preliminary question for the court, and often a difficult one.

Subdivision (c) embodies in the definition of "hearsay" a statement, as defined in (a), other than one made on the witness stand, offered to prove the truth of the matter asserted. This is familiar law. See, e.g., Rockland & Rockport Lime Co. v. Coe-Mortimer Co., 115 Me. 184, 98 A. 657 (1916). Where the fact that the words were spoken is relevant, as words of offer and acceptance in a contract action or slanderous words in a defamation case, there is no hearsay problem. The witness on the stand can be cross-examined as to what was said and its truth is not in issue.

Subdivision (d) expands what is not hearsay. The importance of excluding a statement from the definition of hearsay is that it becomes admissible as substantive evidence. Subsection (1) changes the Maine law with respect to prior inconsistent statements of a witness. Traditionally, evidence of such a statement has been admissible only to impeach the testimony of the witness on the stand and not for its truth. State v. Fournier, 267 A.2d 638, 640 (Me. 1970). An instruction to this effect is, however, hard for the jury to comprehend. Under this rule when the declarant actually testifies as a witness, the jury can judge his demeanor and his credibility can be tested by cross-examination. If the prior inconsistent statement was previously given under oath subject to the penalty of perjury at a trial or other proceeding, it becomes admissible for its truth and not merely to impeach. When the jury decides whether the truth is what the witness now says in court or what he swore to before, it is still deciding from what it sees and hears in court. As originally proposed by the Supreme Court, the rule did not require the prior statement to be under oath in order for it to be admissible as substantive evidence. The Federal Rule as enacted by Congress does require an oath, and the Court accepts this requirement as desirable. While the sanctity attributed to the oath is less than it once was, a sworn statement is a solemn undertaking, subject to the perjury penalty, and inherently much more credible than a mere unsworn statement. If there were no requirement for an oath, it would be possible to get a case to the jury when the only evidence of an essential fact was a casual out-of-

court statement which the declarant repudiates in court under oath. Any prior inconsistent statement not under oath is still admissible for the purpose of impeachment, as it is under present law. The concluding sentence limiting a prior consistent statement, whether or not under oath, to use in rebuttal of a claim of recent fabrication or improper influence or motive states the present Maine law. Although probably unnecessary, it is included here for the sake of clarity. One reason for including it is to emphasize the difference from the Federal Rule, which makes a prior consistent statement substantive evidence.

Subsection (2) deals with admissions by a party-opponent. There has been a learned dispute over whether a party's admissions are admissible as an exception to the hearsay rule or are not classified as hearsay at all. This rule takes the latter view. In either event, they are admissible. A party's own statement is the classic example of an admission. It is often confused with a statement against interest, a hearsay exception covered in Rule 804(b)(3). An admission may be made only by a party. It need not be of his own knowledge, it need not be contrary to his interest when made, and it is not necessary that the party be unavailable at trial. A statement against interest need not be, and usually is not, made by a party. It must be contrary to the declarant's interest when made, and the declarant must be unavailable at trial.

Subsection (2)(B), covering adoptive admissions, is in accord with Maine law. Adoption may be manifested by words or by silence. Silence may be a tacit admission of facts stated in ones hearing under circumstances such as naturally call for a reply if no admission is intended. Gerulis v. Viens, 130 Me. 378, 156 A. 37 8 (1931). The party must have heard and understood the statement and have been at liberty to reply.

Subsection (2)(C) makes admissible statements made by a person authorized by a party to make a statement to a third person concerning the subject. Statements made by the agent to the principal are not admissions of the principal. This is in accord with Maine law. Warner v. Maine Central R. R., 111 Me. 149, 88 A. 403 (1913).

Subsection (2)(D) makes admissible an out-of-court statement of an agent or servant concerning a matter within the scope of his employment, but not to his principal or employer, made during the existence of the relationship. The traditional rule has been to apply the usual agency test and determine whether the statement was authorized by the principal. The difficulty with this is that very rarely is an agent employed to make damaging statements. The truck driver is hired to drive, not to talk. The subsection at least formally changes Maine law. In practice, however, another basis for admissibility has frequently been found, such as a spontaneous statement, part of the res gestae and the like, often by stretching those concepts to or beyond the breaking point.

Subsection (2)(E) making admissible the statements of a co-conspirator of a party during the course and in furtherance of the conspiracy is in accord with Maine law. See State v. Vetrano, 121 Me. 368, 117 A. 460 (1922). It is consistent with the position of the Supreme Court in denying admissibility to statements made after the objectives of the conspiracy have either failed or been achieved. Krulewitch v. United States, 336 U. S. 440, 69 S.Ct. 716 (1949).

There are three departures from the Federal Rule. One already mentioned is the difference in treatment of a prior consistent statement. The other two are in subdivision (d)(2)(C) and (D), in both of which statements made by an agent or servant to his employer are not admissions against the employer, as they are under the Federal Rule.

EXPLANATION OF AMENDMENT
(October 1, 1976)

The purpose of this amendment was to exclude from the category of hearsay a statement of prior identification of a person made by a declarant who testifies at the trial and is subject to cross-examination. It restores a provision in the Tentative Draft of the rules which was in the Supreme Court's proposed rule and in the bill as it passed the House of Representatives. When the Tentative Draft was submitted to the Bar, no adverse comments on the rule were received. The provision was deleted by Congress in the final version of the rule in the face of a threatened filibuster which jeopardized passage of the bill. The Court on recommendation of the Evidence Rules Committee also deleted it solely to conform to the Federal Rule as enacted by Congress. Congress restored the provision on October 16, 1975, so the reason for its deletion from the Maine rule no longer exists.

Advisory Committee Note
(April 1, 1998 Amendment)

This amendment is proposed to bring Maine Rule 801(d)(2) into conformity with its federal counterpart as amended in 1997. The amendment resolves a previously unresolved issue in Maine, namely whether a hearsay statement can be used to prove its own foundation as a vicarious admission. See Field and Murray, Maine Evidence (4th Ed.) §§ 801.7 and 801.8. Under the rule as amended, the hearsay statements could be used to prove the foundation for the vicarious admissions, but would not alone be sufficient proof of such foundation without some independent evidence.

RULE 802. HEARSAY RULE

Hearsay is not admissible except as provided by law or by these rules. The words "as provided by law" include applicable state and federal statutes, the Maine Rules of Civil Procedure and the Maine Rules of Criminal Procedure.

ADVISERS' NOTE

The proposition that hearsay is not admissible except as provided by these rules requires no comment.

RULE 803. HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition such as intent, plan, motive, design, mental feeling, pain, and bodily health, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly. If admissible, the memorandum or record may be read into evidence but shall not be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted business. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business, and if it was the regular practice of that business to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 903(12) or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports.

(A) To the extent not otherwise provided in (B), records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law.

(B) The following are not within this exception to the hearsay rule: (i) investigative reports by police and other law enforcement personnel; (ii) investigative reports prepared by or for a government, a public office or an agency when offered by it in a case in which it is a party; (iii) factual findings offered by the state in criminal cases; (iv) factual findings resulting from special investigation of a particular complaint, case, or incident; (v) any matter as to which the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency,

evidence in the form of a certification in accordance with Rule 902, or testimony that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) RESERVED.

(16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established.

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admissible, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history. Reputation among members of a person's family by blood, adoption, or marriage, or among the person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of the person's personal or family history.

(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) Reputation as to character. Reputation of a person's character among associates or in the community.

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty, adjudging a person guilty of a crime punishable by death or imprisonment of one year or more, to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused.

(23) Judgment as to personal, family or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

ADVISERS' NOTE

The framework of this and the following rule is to separate statements made by a declarant even though he is available as a witness from those made by a declarant who is unavailable. For the most part, the exceptions in this rule from the prohibition against hearsay evidence are those evolved on a case-by-case basis by the common law and presently recognized in Maine. The differences will be discussed under the separate subdivisions.

Subdivisions (1) and (2) overlap somewhat, although they are based on different theories. The theory of (1) is that a statement substantially contemporaneous to the event being described is most unlikely to be a deliberate or conscious misrepresentation. There is no requirement that the event be an exciting one, although it usually will be, since unexciting events are not likely to evoke comment. The theory of (2) is that witnessing a startling event produces a state of excitement which for the time being stills the reflective faculties and negatives a purpose to fabricate evidence. It differs from (1) in that a greater lapse of time is allowable. The crucial question is how long the state of excitement may be found to last. This is a preliminary question for the judge. The principle is well established by Maine case law. See State v. Ellis, 297 A.2d 91 (Me. 1972), where admissibility was denied, and State v. Lafferty, 309 A.2d 647 (Me. 1973), where the statements were admitted.

Subdivision (3) makes admissible statements of the declarant's then existing state of mind, such as intent, plan, motive, and the like. The principle is illustrated by Maine cases. Colby v. Tarr, 139 Me. 277, 29 A.2d 749 (1943); State v. Trask,

223 A.2d 823, 826 (Me. 1966). The rule excludes in general statements of memory or belief to prove the fact remembered or believed. This, as the Federal Advisory Committee said, is necessary to avoid the virtual destruction of the hearsay rule which would result from allowing state of mind, provable by an out-of-court statement, to serve as a basis for inference of the happening of the event which produced the state of mind. A prime example of this danger is Shepard v. United States, 290 U. S. 96, 54 S.Ct. 22 (1933). There the statement that "Dr. Shepard has poisoned me" was held inadmissible despite the argument that it showed the victim's state of mind—a will to live—in order to rebut evidence of intent to commit suicide. It preserves the result in the notorious case of Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285, 12 S.Ct. 909 (1892), where a letter from one Walters that he intended to go to Crooked Creek with Hillmon was held admissible, his statement of present intent making it more probable that he went and went with Hillmon. A statement of then existing state of mind eliminates the memory risk inherent in a statement reflecting a past state of mind.

The subdivision also removes from the generalization excluding statements of memory or belief to prove the fact remembered or believed statements relating to the execution, revocation, or identification of the terms of the declarant's will, thus making such statements admissible. The Federal Advisory Committee said that this represents an ad hoc judgment, resting on practical grounds of necessity and expediency rather than logic. This rule does not affect the Maine cases holding that oral testimony of the testator's intentions is inadmissible. Bryant v. Bryant, 129 Me. 251, 151 A. 429 (1930); First Portland Nat'l Bank v. Kaler-Vaill, 155 Me. 50, 151 A.2d 708 (1959).

Subdivision (4) recognizes an exception to the hearsay rule statements made for the purpose of medical diagnosis or treatment. Such statements are now admissible under Maine law, not as proof of the facts stated but only as they might support or explain the doctor's diagnosis or opinion. Goldstein v. Sklar, 216 A.2d 298 (Me. 1966). This subdivision admits the statements for their truth. The justification is the patient's strong motivation to be truthful. Furthermore, it is unrealistic to assume that the lay juror is capable of making the nice discrimination between admissibility for truth and for the other purposes allowable under present law.

The words "insofar as reasonably pertinent to diagnosis or treatment" are broad enough to cover statements as to the cause of an injury ("I was struck by a car") but not statements of fault ("The car went through a red light").

The statement need not have been made directly to a physician in order to be admissible, but would include statements to an ambulance driver, emergency room attendants (interns, nurses, orderlies and the like), or to members of the family. "Medical treatment" is not broad enough, however, to include a statement by a

child to its mother for administration of a home remedy such as a dose of aspirin or soaking of a bruised hand.

Subdivision (5) recognizes the familiar hearsay exception for past recollection recorded. Cope v. Sevigny, 289 A.2d 682 (Me. 1972). The rule is silent as to whether exhibits are to be sent to the jury room, thus giving the court the same discretion as at present. Customarily the written memorandum is not allowed to go to the jury room because it may impart "an aura of veracity and accuracy not normally attached to the spoken words." Morgan v. Paine, 312 A.2d 178, 185 (Me. 1973).

Subdivision (6) covers the hearsay exception for records of a regularly conducted business. It gives somewhat broader coverage to business records than present Maine law. It would not admit personal check stubs, held inadmissible in Supruniuk v. Petriw, 334 A.2d 857 (Me. 1975), and like individual financial records nor a personal diary concerning daily weather conditions, regularly kept as a hobby, held inadmissible under the old "shopbook" rule in Arnold v. Hussey, 111 Me. 224, 88 A. 724 (1913). It should be noted that records not admissible under this exception may get in through some other route, such as admissions, statements against interest, past recollection recorded, and so on.

Subdivision (7) is a necessary complement to subdivision (6). It provides that the absence of an entry is admissible to prove nonoccurrence or nonexistence of the matter. Compare M.R.C.P. 44(b), dealing with proof of lack of official record.

Subdivision (8) creates a hearsay exception for various types of public records and reports. There is a common law exception for public records and there are numerous Maine statutes facilitating the admission of specified official records. This subdivision is largely a generalized statement of the provisions found in these statutes. The justification is the assumption, by no means an inevitable one, that a public official will perform his duties properly. There is an escape clause in (B)(v) providing for exclusion if there are circumstances indicating lack of trustworthiness. The corresponding Federal subdivision is substantially different in form and in some respects in substance also. The chief substantive difference is that the Federal Rule excludes from matters as to which there was a duty to report "[i]n criminal cases matters observed by police officers and other law enforcement personnel." Note, however, sub-paragraph (B) of the Maine rule, which excludes from this exception investigative reports by police and other law enforcement personnel. The formulation of the subdivision, which is taken from the Uniform State Law, seems more readily understandable.

Subdivision (9) makes admissible records of vital statistics. It is written so that it is sufficient if the report is made to a public office pursuant to requirements of law (not necessarily by a public officer). Thus certificates of ministers or

physicians are admissible. The subdivision does not make the record admissible as to cause of death. In this respect it is like 22 M.R.S.A. § 2707. Under Maine case law the certificate is not admissible for that purpose. Barton v. Beck's Estate, 159 Me. 446, 195 A.2d 63 (1963).

Subdivision (10) is similar to subdivision (7) in permitting proof of nonoccurrence of an event by evidence of nonexistence of a public record that would ordinarily be made of its occurrence. Thus this mode of proof may be used in connection with matters referred to in subdivisions (8) and (9), just as can be done under subdivision (7) with respect to subdivision (6).

Subdivision (11) may overlap somewhat subdivision (6). It makes admissible statements from records of churches and religious societies concerning births, marriages, divorces, deaths and other similar facts of personal or family history. Many of these could come in under the business records exception in subdivision (6). That subdivision, however, requires that any person supplying the recorded information have a duty to do so, thus following the leading case of Johnson v. Lutz, 253 N.Y. 124, 170 N.E. 517 (1930) (police report incorporating information obtained from a bystander inadmissible). The present subdivision does not include such a requirement, on the theory that there is every reason to repose trust in the data submitted to a religious organization, such as the age of a child for inclusion in a baptismal certificate.

Subdivision (12) provides for admission of statements of fact in a marriage, baptismal, or similar certificate. It duplicates in part subdivision (8) for public records, but it is broader, including baptism and confirmation. It applies to the certificate given to the parties by the clergyman or like person who performs the ceremony.

Subdivision (13) conforms to the traditional approach, making records of family history in Bibles and the like admissible. It covers inscriptions on family portraits, tombstones and other types of record, even though the author may not be identifiable.

Subdivision (14) creates a hearsay exception for the record of a deed as proof of the content of the document and its execution and delivery. This is a slight change in Maine law. Under 16 M.R.S.A. § 452 an attested copy from the registry may be used in evidence without proof of execution when the party offering it is not the grantee in the deed, nor claiming as his heir, nor justifying as his agent. This subdivision makes such a record admissible without limitation. It is to be noted that the record is merely made admissible without giving it presumptive force. If there is a genuine controversy, more persuasive evidence should be sought.

The Federal Rule contains a subdivision (15) recognizing a hearsay exception for statements in documents affecting an interest in property. The Court

accepted subdivision (14) for the record of a document affecting an interest in property as proof of its content, execution, and delivery but declined to extend the exception to statements contained in such a document.

Subdivision (16) makes admissible statements in a document in existence twenty years or more if its authenticity has been established. Authentication may be achieved by showing that a document is "ancient" pursuant to Rule 901(b)(8). But authentication does not resolve the question of admissibility of assertive statements in the document. A hearsay exception is also necessary, and this subdivision provides it. It also reduces the thirty-year time period of the common law tradition, recognized in Landry v. Giguere, 128 Me. 382, 147 A. 816 (1929), to twenty years.

Subdivision (17) creates an exception to the hearsay rule for market quotations, directories or other published compilations used and relied upon by the public or by persons in particular occupations. Maine now provides in 11 M.R.S.A. § 2-724, the Uniform Commercial Code, that when goods are traded in an established market, market reports in official publications, trade journals, or newspapers are admissible. There are decisions from other jurisdictions admitting stock market quotations, city directories, telephone directories, and the like.

Subdivision (18) changes Maine law by making learned treatises called to an expert's attention on cross-examination and established as authoritative admissible as substantive evidence. Hitherto admission of a learned treatise over objection has been forbidden except to impeach an expert witness who relies upon such authority for the opinion he has expressed. Goldthwaite v. Sheraton Restaurant, 154 Me. 214, 145 A.2d 362 (1958). This subdivision, as in the case of other rules, implicitly accepts the proposition that jurors are unlikely to understand and follow limitations on the purpose for which evidence is admitted, such as the difference between use for impeachment and as substantive evidence. It is to be noted that the expert himself need not even recognize the treatise as authoritative so long as its authoritativeness is somehow established, such as by testimony of another expert or, conceivably, by judicial notice. Thus the possibility is avoided that the expert may block cross-examination by denying either reliance or authoritativeness.

There is nothing in this subdivision to prevent the use for impeachment of any writing, authoritative or not, as can be done at present.

The Federal Rule makes admissible a learned treatise relied upon by an expert on direct examination as well as one called to his attention upon cross-examination. It seems undesirable to allow an expert to bolster his direct testimony by use of a supporting treatise as substantive evidence. The Federal Advisory Committee's statement that the chance of misunderstanding and misapplication of the treatise is avoided because the expert is on the stand and available to explain it is unimpressive.

Subdivision (19) recognizes and broadens one of the oldest exceptions to the hearsay rule, evidence of reputation concerning personal or family history. Marriage has always been considered a proper subject of proof by evidence of community reputation, but there has been a split as to birth, death, legitimacy, adoption and relationship. This exception extends to all of these matters. The rule allows evidence of reputation in the community or among associates as well as in the family. The Federal Advisory Committee said: "This world [in which the reputation may exist] has proved capable of expanding with changing times from the single uncomplicated neighborhood, in which all activities take place, to the multiple and unrelated worlds of work, religious affiliation, and social activity, in each of which a reputation may be generated." The rule does not require that the declarations be made before the controversy leading to the litigation developed, nor is it necessary to show that the declarant is unavailable. It must be emphasized that reputation in the community means more than mere gossip.

Subdivision (20) makes admissible evidence of reputation in a community, arising before the controversy, as to boundaries affecting lands in the community. It allows such evidence with respect to both public and private boundaries. This is the general rule in the United States, but Maine has limited its application to public boundaries. Chapman v. Twitchell, 37 Me. 59 (1853). The rule also admits reputation evidence as to matters of general history. This aspect of the rule is in accord with Maine law. Piper v. Voorhees, 130 Me. 305, 155 A. 556 (1931) (Maine Historical Society Map in the History of Scarborough admissible without extrinsic evidence of authenticity).

Subdivision (21) makes admissible evidence of reputation of a person's character among his associates or in the community. This has long been the subject of a hearsay exception. This subdivision is merely a restatement, in the hearsay context, of Rule 405(a) which outlines the methods of proving character.

Subdivision (22) makes evidence of a conviction of a crime punishable by imprisonment for one year or more admissible for the purpose of proving any fact essential to the judgment (but not a judgment against a person other than the accused when offered by the state to prove any such fact). The traditional rule denies admissibility, but there is no Maine case law on the point.

There is an increasing tendency to hold a judgment of conviction of a crime conclusive against the accused in a subsequent civil case, as when a person convicted of arson seeks to recover on the fire insurance policy covering the burned property. This subdivision has nothing to do with this use of res judicata or collateral estoppel. However desirable it would be to have such a rule, it is a matter of substantive law beyond the scope of rules of evidence. Failing that, the half-way measure of making evidence of a conviction admissible but not conclusive seems

desirable. Adoption of the subdivision should not be taken as foreclosing the Court from holding that res judicata principles make the conviction conclusive.

Subdivision (23) makes admissible a prior judgment involving matters of personal, family or general history or boundaries, if the same would be provable by reputation evidence. It seems reasonable to conclude that the process of inquiry and scrutiny which is relied upon to render reputation reliable is present to as great or greater degree in the process of litigation. The number of cases dealing with the issue is very small. In the leading case, Patterson v. Gaines, 47 U.S. (6 How.) 550 (1848), a prior judgment of legitimacy was received as prima facie evidence in a later civil action.

The Federal Rule contains a subdivision (24), a catch-all provision which would allow the court to admit evidence "having equivalent circumstantial guarantees of trustworthiness" to the listed exceptions. This reflects the judgment of Congress that it is undesirable to freeze the hearsay exceptions so as to prevent the ordinary and rational development of the law of evidence without the necessity of amending the rules to respond to a situation which has arisen in a given trial. Such an amendment would of course be too late to affect the result of that trial. The rule as enacted by Congress plainly evinces concern lest too much uncertainty be injected in the law of evidence and a fear that trial judges would exercise in widely different ways their judgment as to what constituted "equivalent circumstantial guarantees of trustworthiness." The rule incorporates safeguards designed to minimize this hazard. It requires a determination by the trial court that the statement is offered as evidence of a material fact, that it is more probative on the point than any other evidence reasonably available, and that the interests of justice will best be served by its admission. Moreover, notice of the intention to offer the statement must be given sufficiently in advance of trial to provide a fair opportunity to prepare to meet it. The notice must give the particulars of the statement, including the name and address of the declarant. The court will be expected to give the opponent a full and adequate opportunity to contest the admission of the statement. Moreover, the Senate Committee Report emphasized the exceptional nature of the use of the provision saying: "It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances. The committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in rules 803 and 804(b). The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions."

The Court decided not to adopt any catch-all provision. It was impressed by the theoretical undesirability of foreclosing further development of the law of evidence on a case-by-case basis. It concluded, however, that despite the purported

safeguards, there was a serious risk that trial judges would differ greatly in applying the elastic standard of equivalent trustworthiness. The result would be a lack of uniformity which would make preparation for trial difficult. Nor would it be likely that the Law Court on appeal could effectively apply corrective measures. There would indeed be doubt whether an affirmance of an admission of evidence under the catch-all provision amounted to the creation of a new exception with the force of precedent or merely a refusal to rule that the trial judge had abused his discretion.

Flexibility in construction of the rules so as to promote growth and development of the law of evidence is called for by Rule 102. Under this mandate there will be room to construe an existing hearsay exception broadly in the interest of ascertaining truth, as distinguished from creating an entirely new exception based upon the trial judge's determination of equivalent trustworthiness, a guideline which the most conscientious of judges would find extremely difficult to follow.

Advisory Committee Note
(July 1, 2002 Amendment)

These amendments are intended to ease the process of admission of records of regularly conducted activity covered by Rule 803(6). Rule 803(6) excepts from the Hearsay Rule records certified in accord with Rules 902(11) and 902(12). The new subsections of Rule 902 provide for certification of records of regularly conducted activity by domestic entities in both civil and criminal cases, and for certification of records of foreign entities in civil cases only. The certificate establishes the foundational facts required for admissibility under Rule 803(6). The new rules apply both to records of parties as well as records of non-party entities.

The proposed amendment parallels a recent amendment to the Federal Rules of Evidence. Like the Federal version, the Maine version requires advance notice of intention to offer evidence under this provision. The Maine version goes a little beyond the Federal version in expressly authorizing the trial court to decline to accept the certification in the interests of justice, thus requiring the party offering the certificate to provide the foundation by other evidence, in most cases testimony complying with Rule 803(6). To the extent feasible objection to a certified record must be made in a timely manner to permit the proponent opportunity to procure any necessary foundation testimony.

For the purpose of this rule, the term "domestic" refers to the 50 United States of America, not just the State of Maine. A domestic record would be a record of an entity doing business in a domestic jurisdiction.

The changes in the rules do not affect the scope of Rule 803(6), which is intended to cover records of entities and activities other than governmental records covered by Rule 803(8).

RULE 804. HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

(a) Definition of unavailability. "Unavailability as a witness" includes situation in which the declarant:

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance by process or other reasonable means.

A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement under belief of impending death. A statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability or to render invalid a claim by the declarant against another or to make the declarant an object of hatred, ridicule, or disgrace, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to

expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. A statement or confession offered against the accused in a criminal case, made by a defendant or other person implicating both the declarant and the accused, is not within this exception.

(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

ADVISERS' NOTE

This rule covers hearsay exceptions when the declarant is unavailable. Subdivision (a) defines unavailability. Subsection (1), providing that a successful claim of privilege satisfies the unavailability requirement, is in accord with Maine law. State v. Robbins, 318 A.2d 51 (Me. 1974). Subsection (2) provides that one who simply refuses to testify despite an order to do so is unavailable. No Maine case on the point has been found, but the great weight of authority is in accord. McCormick, Evidence (2d ed.) 612; United States v. Mobley, 421 F.2d 345 (5th Cir. 1970).

Subsection (3) provides that one who testifies to a lack of memory of the subject matter of his statement is unavailable. Again, no Maine case has been found and the cases elsewhere are few and conflicting. The claimed lack of memory must be established through the testimony of the witness at the trial and subject to cross-examination on his memory and his motives. On this preliminary question, the court may disbelieve the testimony of the declarant as to his lack of memory. See United States v. Insana, 423 F.2d 1165, 1169-70 (2d Cir. 1970).

Subsection (4) provides that death and then existing mental illness or infirmity are grounds for a finding of unavailability. Death is an obvious and longstanding basis for this finding. Dwyer v. State, 154 Me. 179, 145 A.2d 100 (1958). Physical or mental illness or infirmity is also generally accepted. Compare M.R.C.P. 32(a)(3) (use of deposition if witness dead or unable to attend or testify because of age, illness, or infirmity); M.R. Crim. P. 15(e) (to same effect—death, sickness, or infirmity). In Maine even a temporary disability has been held sufficient. Chase v. Springvale Mills Co., 75 Me. 156 (1883). Most cases involving temporary disability are, however, handled by a continuance.

Subsection (5) provides that a declarant is unavailable if his presence cannot be secured by legal process or if he simply cannot be found. There is no requirement that an attempt be made to depose the declarant. The Federal Rule is to the contrary. The proponent must have been unable to procure the attendance or testimony of the witness by process or other reasonable mean. This imposes a needless and impractical complication. Depositions are expensive and time-consuming and the Civil and Criminal Rules are not well adapted to implementing this requirement. No purpose is served unless the deposition, if taken, may be used as evidence. Under M.R.C.P. 32(a)(3) and M.R. Crim. P. 15(e) a deposition may not be admissible and under M.R. Crim. P. 15(a) obstacles exist to even taking a deposition. The existing deposition procedure remains available to those who wish to use it.

Subdivision (a) concludes with the pronouncement that a witness is not "unavailable" if the circumstances which would otherwise constitute unavailability are due to the procurement or other wrongdoing of the proponent of the declaration. Cf. M.R.C.P. 32(a)(3) (" . . . unless it appears that the absence of the witness was procured by the party offering the deposition"); M.R. Crim. P. 15(e) (same).

Subdivision (b)(1) covers the hearsay exception for former testimony. It is in accord with present Maine law in admitting prior testimony only if the party against whom it is offered or, in a civil case, a predecessor in interest, had an opportunity and similar motive to develop the testimony. Ellsworth v. Waltham, 125 Me. 214, 132 A. 423 (1926). In a criminal case, State v. Budge, 127 Me. 234, 142 A. 857 (1928), the state was allowed to introduce upon a second trial the testimony at the first trial of a witness who had left the state so that his attendance could not be compelled. This was held to be a proper exception to the hearsay rule and not a violation of the constitutional right of confrontation.

It is also the Maine law, as it continues to be under the rule, that the testimony is admissible if offered against a party who called the witness at a prior trial. Direct and redirect examination is the equivalent of an opportunity for cross-examination. Dwyer v. State, 154 Me. 179, 145 A.2d 100 (1958).

Subdivision (b)(2) covers the familiar common law exception to the hearsay rule for dying declarations. State v. Chaplin, 286 A.2d 325 (Me. 1972). It expands the common law somewhat by making these declarations admissible concerning the cause or circumstances of what the declarant believed to be his impending death without limitation as to type of case. At common law the declaration of the victim was admissible only if offered in a criminal homicide case. Death is not the only form of unavailability under this subdivision. If the declarant believed death was imminent when he spoke and if he is unavailable at the time of trial, the declaration is admissible if in fact the declarant is not dead when the case is tried.

The Federal Rule limits this exception to prosecutions for homicide and civil actions, thus eliminating it from criminal prosecutions other than for homicide.

Subdivision (b)(3) covers declarations against interest. It applies to declarations by nonparties; if a statement is that of a party, offered by an adverse party, it is an admission under Rule 801(d)(2), which provides that an admission of a party opponent is not hearsay. The familiar common law declaration against interest exception was confined to declarations against pecuniary or proprietary interest. Maine has long recognized this exception. Consolidated Rendering Co. v. Martin, 128 Me. 96, 106, 145 A. 896, 900 (1929). It is required that the statement be against interest at the time it was made. Small v. Rose, 97 Me. 286, 54 A. 726 (1903). The subdivision adds declarations subjecting the declarant to criminal or civil liability, including tort liability. It also adds declarations tending to make the declarant an object of hatred, ridicule, or disgrace. The justification is that the motivation here to tell the truth is as strong as when financial interests are at stake. It is a preliminary question for the court whether a given statement would tend to make the declarant an object of hate, ridicule, or disgrace. The Federal Rule does not include a provision for this last type of declaration.

Subdivision (b)(4) deals with the hearsay exception for statements of personal or family history. It drops some of the conditions imposed by Northrop v. Hale, 76 Me. 306 (1884), the leading Maine case, in an effort to ensure reliability. These conditions on admissibility of declarations concerning pedigree were: (1) there must be evidence outside the declaration that the declarant was lawfully related by blood or marriage to the person or family whose history the facts concern; (2) the declarant must be dead when the declaration is offered; and (3) the declaration must have been made before commencement of the litigation. Under this subdivision the ante litem motam requirement is eliminated, the time of the declaration with reference to the institution of the lawsuit going to its weight, not its admissibility. Under (A) it is not required that the declarant have firsthand knowledge of the facts of his own pedigree. Obviously, he would have no firsthand knowledge of the date of his birth. Under (B) the declarant qualifies as a consequence of intimate association with the family of the person whose pedigree is in issue. This is contrary to a dictum in Northrop. The subdivision also goes beyond Northrop in allowing other bases of unavailability besides death.

The Federal Rule contains a catch-all provision like that in Rule 803(24).

RULE 805. HEARSAY WITHIN HEARSAY

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

ADVISERS' NOTE

This rule covers hearsay within hearsay, sometimes called "totem pole" hearsay. It provides for a two-stage approach. If each part of the combined statement conforms to some hearsay exception it is all is admissible. The Federal Advisory Committee gives as an example a dying declaration which incorporates a declaration against interest by another out-of-court declarant. In contrast, a declaration itself within an exception cannot include a statement of another declarant which does not fall within an exception. An example is Johnson v. Lutz, 253 N.Y. 124, 170 N.E. 517 (1930) (information from a bystander incorporated in a police report not admissible; the bystander's statement was inadmissible hearsay).

RULE 806. ATTACKING AND SUPPORTING CREDIBILITY OF DECLARANT

When a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

ADVISERS' NOTE

This rule gives the factfinder the widest opportunity to assess the credibility of a hearsay declaration. It allows an attack by any evidence which would be admissible if the declarant had testified as a witness. For example, his bias or prejudice, his conviction of a crime, or his inconsistent statements may be shown. This seems no more than common fairness requires.

Classification of admissions by a party-opponent as not being hearsay under Rule 801(d)(2) might have the consequence of not allowing the declarant's credibility to be attacked under this rule if the reference to such admissions were not included. Plainly an employer should be allowed to impeach an employee or an alleged conspirator to impeach a co-conspirator so as to weaken the effect of their out-of-court statements.

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

RULE 901. REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION

(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge. Testimony of a witness with knowledge that a matter is what it is claimed to be.

(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by court or expert witness. Comparison by the court or by expert witnesses with specimens which have been authenticated.

(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, which may include self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or data compilations. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence twenty years or more at the time it is offered.

(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods provided by statute or rule. Any method of authentication or identification provided by a rule of the Supreme Judicial Court of this state or by a statute or as provided in the Constitution of this state.

ADVISERS' NOTE

The rule implements Rule 104(b), which requires authentication of evidence as a condition of its admissibility. Authentication is an aspect of relevancy. For instance, the relevancy of a letter of acceptance in a contract case against a corporation depends upon its having been written by someone with authority, real or apparent, to do so. Absent such authentication it is just as irrelevant as if it bore on an immaterial topic. Similarly, a telephone conversation may be irrelevant because the speaker has not been identified; in other words, the conversation has not been authenticated.

Subdivision (a), requiring authentication or identification as a condition precedent to admissibility, is universal law.

Subdivision (b) provides a nonexclusive list of ten examples of authentication or identification. Most of them are noncontroversial and reflect generally existing law.

Example (1) describes the most obvious method of authentication-testimony of a witness with direct knowledge that a matter is what it purports to be; e. g., "I wrote this document"; "I saw X sign it"; or "I found this gun at the scene". The witness might also be one to account for the custody of the gun from the seizure to the time of trial.

Example (2) is in accord with customary practice regarding nonexpert handwriting identification. Anyone with a sufficient familiarity with another's handwriting may testify. This may come from having seen the asserted author write, or from a bank clerk or teller. It is obvious that a lay person's attempted distinction between a genuine writing and a skilled forgery is essentially valueless, and it is only good sense to obtain the testimony of a bona fide handwriting expert if the matter is of serious consequence. It is to be noted that the nonexpert cannot give testimony based on familiarity acquired for the purpose of the litigation, although the expert can.

Example (3) allows a handwriting expert to express an opinion on the basis of a comparison between a questioned document and an authenticated genuine specimen. This is the accepted practice. It also allows the court to make the comparison. The question of authentication is a matter of conditional relevancy

depending upon fulfillment of a question of fact, which is governed by Rule 104(b).

Example (4) is rather vague in its wording, but it stands for the self-evident proposition that an item of evidence may sometimes be authenticated by its own special characteristics, viewed in the context of the case. An example is the familiar reply doctrine to the effect that the arrival by mail of a reply purporting to be from the addressee of a prior letter duly addressed and mailed is sufficient evidence of genuineness to go to the jury. Whelton v. Daly, 93 N.H. 150, 37 A.2d 1 (1944), is a leading case. Similarly, a communication may be authenticated as coming from a particular person if it discloses knowledge of facts known peculiarly by that person. Cf. Perley v. McGray, 115 Me. 398, 99 A. 39 (1916) (proof that copy of account was sent to defendant from fact that defendant acted on it a few days later by return of goods included in the account).

Example (5) allows voice identification, heard firsthand or by electronic transmission, by opinion based on familiarity obtained either before or after the speaking in question. Plainly such testimony may lack credibility, but this goes to its weight and not its admissibility.

Example (6) deals with outgoing rather than incoming telephone calls. A call from the blue by a person identifying himself as X requires additional proof of his identity, which may be by the techniques suggested in (b)(4) or (b)(5). The calling of a number listed by the telephone company (see Rule 803(17) for the hearsay exception for the listing) supports the assumption that the number is the one reached. If the telephone number is that of a business, the listing is a holding out of willingness to conduct business by telephone, the person answering and purporting to speak for the concern is presumed to have authority to do so, and a person to whom such a call is transferred is likewise presumed to have authority to speak for the concern with respect to matters within its ordinary course of business.

This example also provides that circumstances, which may include the self-identifying statement of the person answering the outgoing call, may suffice. See Palos v. United States, 416 F.2d 438 (5th Cir. 1969) (informer dials listed number, asks for defendant and receives answer, "This is he," held sufficient to authenticate); United States v. Benjamin, 328 F.2d 854 (2nd Cir. 1964) (to same effect). But the cases on this point are not unanimous.

Example (7) is in accord with standard practice. Public records have long been subject to authentication by proof of production from proper custody. The inclusion of "data compilation" is sufficient to cover information retrieval by computer.

Example (8) provides for authentication of ancient documents. Their admissibility as a hearsay exception has been dealt with in Rule 803(16). This subdivision is unorthodox in two respects. (1) It extends the rule to computerized

data, and (2) it reduces the time period from thirty years to twenty years. This would change the Maine law enunciated in Landry v. Giguere, 128 Me. 382, 147 A. 816 (1929).

Example (9) faces up to present-day problems where the accuracy of a result depends upon the process or system that produces the result. The use of a computer printout would be covered, as would a reading on radar equipment, upon evidence showing that the system produces an accurate result. The Federal Advisory Committee pointed out that the rule is not intended to foreclose judicial notice of the accuracy of the system where appropriate.

Example (10) makes it clear that methods of authentication provided by statute are not superseded by the rule. An example of a Maine statute that would not be superseded is 13-A M.R.S.A. § 1306 (various corporate records certified under oath of clerk, secretary or an assistant secretary of the corporation admissible). There are many others.

RULE 902. SELF-AUTHENTICATION

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) Domestic public documents not under seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) Foreign public documents. A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign

country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any law of the United States or of this state.

(5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.

(6) Newspapers and periodicals. Printed material purporting to be newspapers or periodicals.

(7) Trade inscriptions and the like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) Acknowledged documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) Commercial paper and related documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) Presumptions created by law. Any signature, document, or other matter declared by any law of the United States or of this state, to be presumptively or prima facie genuine or authentic.

(11) Certified Domestic Records of Regularly Conducted Activity.--The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Judicial Court, certifying that the record--

(A) was made at or near the time of the occurrence of the matter set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to object to the authenticity of the record or on the basis of hearsay. In the event that an adverse party raises objection to a record offered under this paragraph, the court may in the interests of justice refuse to accept the certification under this paragraph and require the party offering the record to provide appropriate foundation by other evidence.

(12) Certified Foreign Records of Regularly Conducted Activity. --In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record–

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to object to the authenticity of the record or on the basis of hearsay. In the event that an adverse party raises timely objection to a record offered under this paragraph, the court may in the interests of justice refuse to accept the certification under this paragraph and require the party offering the record to provide appropriate foundation by other evidence.

ADVISERS' NOTE

This rule covers various kinds of evidence the authenticity of which is sufficiently apparent to allow their introduction without use of extrinsic evidence. Such evidence is said to be self-authenticating. The rule enumerates ten categories

of this type, most of which reflect present practice. It is to be emphasized throughout this rule that admissibility is a separate question from authentication.

Subdivision (1) deals with the self-authentication of domestic public documents under seal. This is a separate question from their admissibility in evidence as an exception to the hearsay rule, covered in Rule 803(8). Under present Maine law a public record kept in Maine may be proved by a copy attested by a person purporting to be the officer having legal custody thereof without further proof. A public record kept outside Maine but within the United States requires that the copy be accompanied by a certificate under seal by a specified public officer. M.R.C.P. 44(a), M.R. Crim. P. 27. This subdivision would eliminate the necessity of "double certification" if the record is "domestic" in the sense that it is kept within the United States as distinguished from a foreign country. It would make the procedure now available for Maine records equally applicable to those from other states. The justification is that the overwhelming majority of these records will be genuine and the rare forgery easily detected. If there is a genuine dispute, a challenge can of course be made, but otherwise a good deal of needless lawyers' work will be saved.

Subdivision (2) deals with a purported official signature on a document not officially sealed. Here the safeguard of authentication by an officer who has a seal is provided because forgery is a more distinct possibility. The subdivision does not apply to notaries public, covered in subdivision (8).

Subdivision (3) deals with the problem of subdivision (1) as applied to the public document of a foreign country. It is essentially the same as present Maine law as set forth in M.R.C.P. 44(a) and incorporated by reference in M.R.Crim.P. 27, but it applies to foreign "public documents" whereas the present Maine law is limited to "official records".

Subdivision (4) provides for authentication of copies of public records or of documents recorded or filed pursuant to authorization by law or by certification of the custodian or other person authorized to make the certification (the custodian not necessarily being the authorized person). The certification itself qualifies as a public document and is admissible as authentic if it conforms to (1), (2), or (3) above.

Subdivision (5) provides for self-authentication of books, pamphlets, or other publications purporting to be issued by public authority. These are most commonly statutes, court reports, rules, and regulations. This generalizes a rule covered by numerous statutes. For example, 1 M.R.S.A. §§ 361-363 self-authenticates the Maine Revised Statutes and their supplements if the book carries a printed certificate of the Secretary of State.

Subdivision (6) allows self-authentication of printed materials purporting to be newspapers and periodicals. The Federal Advisory Committee said: "The

likelihood of forgery of newspapers or periodicals is slight indeed." The Federal Committee may not have been exposed to the convincing-looking faked newspapers, complete with embarrassing headlines, that practical jokers can buy for a modest sum. But it is probably true that the risk of use of a faked paper in litigation is slight. Again, it must be emphasized that admissibility of the authenticated paper is a wholly separate matter from authentication.

Subdivision (7) does away with the need of proof of authenticity of mercantile labels and the like purportedly affixed in the course of business and indicating ownership, control, or origin. This would definitely overturn the well known case of Keegan v. Green Giant Co., 150 Me. 283, 110 A.2d 599 (1954), which held that the label on a can of peas indicating that they came from the Jolly Green Giant was not sufficient authentication. The dissent in that case would thus become law. The continuing authority of Keegan was cast in doubt by State v. Rines, 269 A.2d 9, 14-15 (Me. 1970).

Subdivision (8) provides for self-authentication of documents accompanied by a certificate of acknowledgment under the hand and seal of a notary public or other officer authorized to take acknowledgments. This may be somewhat broader than present Maine statutory law.

Subdivision (9) governs questions of authenticity of commercial paper as provided by general commercial law. The general commercial law is in effect the Uniform Commercial Code. 11 M.R.S.A. §§ 1-202, 3-307, and 3-510 are the relevant authentication provisions of the Code. They deal respectively with documents authorized or required to be issued by a third party, signatures on a negotiable instrument, and protest and dishonor.

Subdivision (10) deals with signatures, documents, or other matter declared by any state or federal statute to be presumptively genuine. There are many Maine statutes of this type. Examples are 22 M.R.S.A. §§ 1183, 1188 (certificate of examining physician admissible on appeal from denial of marriage license); 12 M.R.S.A. § 3404(4) (adoption of regulations of Commissioner of Sea and Shore Fisheries provable by certificate of appropriate official; 16 M.R.S.A. § 457 (copies of register or enrollment of vessel or other custom house records certified by consul, etc., admissible). Federal statutes include 26 U.S.C. § 6064 (signature on tax return prima facie genuine); 10 U.S.C. § 936 (signature without seal prima facie evidence of authenticity of acts of certain military personnel who are given notarial powers).

[See the Advisory Committee Notes to Rule 803 for discussion of the July 1, 2002 amendment to Rule 902 adding sub §§ (11) and (12).]

RULE 903. SUBSCRIBING WITNESS' TESTIMONY UNNECESSARY

Except as provided by statute, the testimony of a subscribing witness is not required to authenticate a writing.

ADVISERS' NOTE

The common law required that attesting witnesses be produced or accounted for. These requirements have generally been abolished unless the law governing the validity of the writing otherwise requires. This rule takes the modern approach. It does not affect the method of proving a will in Maine. 18 M.R.S.A. §§ 103-106. See In re Knapp's Estate, 145 Me. 189, 74 A.2d 217 (1950).

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

RULE 1001. DEFINITIONS

For purposes of this article the following definitions are applicable:

(1) Writings and recordings. ``Writings" and ``recordings" consist of letters, words, sounds, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) Photographs. ``Photographs" include still photographs, X-ray films, video tapes, and motion pictures.

(3) Original. An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

ADVISERS' NOTE

This rule is a modernized version of the misleadingly named "best evidence rule," more accurately to be called the "original writing rule", as the definitions in this rule of the terms used later in the article show.Subdivision (1) defines writings and recordings. Today, "writings" alone would be too narrow, and the rule includes sophisticated methods of data compilation, storage, and retrieval. It also includes electronic recording devices, now in wide use (as in recording "Miranda

warnings," for example). Since inarticulate voices as well as words and figures may have evidentiary value, the rule adds "sounds" to the definition.

Subdivision (2) is self-explanatory.

Subdivision (3) defines an "original." The nature of an original is not always clear. The definition covers some particularized examples. Inclusion of any counterpart intended to have the same effect makes it clear that if a contract states that two or more copies are to be executed and treated as original, each of them is an original under this definition. The same is true, the Federal Advisory Committee pointed out, of a sales ticket carbon copy given to a customer. Although strictly speaking the negative is the true original of a photograph, common usage and common sense treat any print as an original also, and so does this subdivision. A computer printout or other output readable by sight is defined as an original.

The Federal Rule gives a definition of a "duplicate." It is omitted here because the Maine rule gives no special status to duplicates.

RULE 1002. REQUIREMENT OF ORIGINAL

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute.

ADVISERS' NOTE

This rule is the familiar one requiring production of the original writing to prove its contents, expanded to include recordings and photographs as defined in Rule 1001. It applies only when offered to prove the content. There are some events with legal significance that can only occur in writing; for example, a will. In proving that sort of event the original must be produced or its absence accounted for under Rule 1004. Many situations arise where the parties choose to perform the event in writing although the law does not require it. For example, a contract may be made or a notice given in writing. Here also the original must be produced or accounted for. An event may be proved without resort to a writing, such as payment without producing the written receipt which was given or earnings without producing the books of account in which they are entered. It is only when a party voluntarily seeks to make proof by the writing that the rule applies.

Usually a photograph is not offered to prove its content. Typically a witness identifies a photograph as a fair representation of something he saw (unless it is shown to be a fair representation of something germane to the case, it is irrelevant). The photograph is admissible to illustrate his testimony. This is not an attempt to

prove the content of the picture and the rule does not apply. Sometimes, however, the content is sought to be proved. The Federal Advisory Committee offers an automatic photograph of a bank robber as one having independent probative value. Here the rule with respect to the original applies.

There are some situations where the contents of a writing or a photograph are directly in issue. Examples would include libel and copyright cases, cases of invasion of privacy by photograph, and X-rays. Note, however, that with respect to X-rays, an expert may give an opinion based on matters not in evidence. Rule 703.

The reference to exceptions provided by these rules or by statute preserves whatever such exceptions there may be. See, for example, 16 M.R.S.A. § 356 (original entry of transcribed account need be produced only if court so requires).

RULE 1003. RESERVED

RULE 1004. ADMISSIBILITY OF OTHER EVIDENCE OF CONTENTS

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original not obtainable. No original can be obtained by any available judicial process or procedure; or

(3) Original in control of opponent. At a time when an original was under the control of the party against whom offered, the party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and the party does not produce the original at the hearing; or

(4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue.

ADVISERS' NOTE

This rule is largely declaratory of the circumstances under the traditional best evidence rule where production of the original is excused. Loss or destruction of the original, unless the result of the proponent's bad faith, and inability to obtain it from a third person by judicial procedure are obvious grounds. Subdivision (3) provides that a notice to produce is sufficient when the original is in the control of an opposing party. This is not a rule of discovery. It gives the opponent an

opportunity to produce but does not compel it. If the opponent does not produce, the proponent will under this subdivision be allowed to offer secondary evidence of the contents of the original. If he does not have any secondary evidence, he must use discovery procedures like M.R.C.P. 34 in order to learn before trial what the original contains. He can then compel production at trial by use of a subpoena duces tecum. The fact that the original is produced pursuant to notice does not make it admissible. Paradis v. Lewiston, Augusta & Waterville St. Ry., 113 Me. 125, 93 A. 56 (1915). It is also now true that the producing party cannot get it admitted merely because it was produced and examined by the opponent. Morgan v. Paine, 312 A.2d 178, 185 (Me. 1973) (overruling prior decisions to the contrary).

The rule does not recognize degrees of secondary evidence so as to require the "second best" evidence when the original is not available. It has the virtue of simplicity, and the practical motivation to get the most satisfactory evidence possible lest an adverse inference be drawn tends to prevent abuse. This is the English approach, followed in some American cases, but most of the courts in this country do set up orders of preference, such as preferring a written copy to oral testimony.

The rule gives no special status to "duplicates"; that is, counterparts produced by a method so accurate as to eliminate the possibility of error. The Federal Rule makes a duplicate admissible to the same extent as an original unless in the circumstances it is unfair or unless a "genuine question" is raised as to the authenticity of the original. The determination of what constituted a genuine question might well impose great difficulties, as for example when counsel objects to the duplicate on the plausible ground that he does not know about the authenticity of the original and wishes to put his opponent to his proof. It appears that special treatment of duplicates would cause more trouble than it is worth. Naturally a duplicate will still be admissible as secondary evidence when production of the original is excused under this rule.

When it comes to a motion for a new trial or on appeal, an asserted error in admitting secondary evidence may be classed as harmless. The purpose of the best evidence rule is to secure the most reliable information as to the contents of a document when its terms are disputed. The rule is not an end in itself. Consequently if complaining counsel is asked whether there is an actual dispute as to the terms of the writing and he cannot give assurance that such a good faith dispute exists, any deviation from the rule should be harmless error.

RULE 1005. PUBLIC RECORDS

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

ADVISERS' NOTE

This rule exempts public records from the requirement of production of the original under Rule 1002, since their removal from public custody is not feasible. Contrary to the approach in Rule 1002, which makes no distinction between kinds of secondary evidence, this rule expresses an absolute preference for certified or compared copies. Cf. 16 M.R.S.A. § 456 (copy by photographic, photostatic, or microfilm process or the like is admissible in evidence as original).

RULE 1006. SUMMARIES

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The original shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

ADVISERS' NOTE

This rule is in accord with Maine law. State v. Huff, 157 Me. 269, 276, 171 A.2d 210, 214 (1961).

RULE 1007. TESTIMONY OR WRITTEN ADMISSION OF PARTY

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by the party's written admission, without accounting for the nonproduction of the original.

ADVISERS' NOTE

This rule dispenses with accounting for nonproduction of the original when the contents are proved by opponent's testimony, deposition, or written admission.

The risk of inaccuracy is substantial and the rule is somewhat inconsistent with the underlying purpose of preferring originals, but it seems reasonable in an adversary situation such as this. The limitation to testimony or a written admission wisely prevents evidence of an oral admission out of court, which may be suspect.

RULE 1008. FUNCTIONS OF COURT AND JURY

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is for the court to determine in accordance with the provisions of Rule 104.

ADVISERS' NOTE

The ultimate decision in these matters of conditional relevancy is of course for the jury. State v. Chaplin, 286 A.2d 325 (Me. 1972).

ARTICLE XI. MISCELLANEOUS RULES

RULE 1101. APPLICABILITY OF RULES

(a) Rules applicable. Except as otherwise provided in (b), these rules apply to all actions and proceedings in the Supreme Judicial Court, the Superior Court, the District Court, and the Probate Court.

(b) Rules inapplicable. The rules other than those with respect to privileges do not apply in the following situations:

(1) Preliminary questions of fact. The determination of questions of fact preliminary to admissibility of evidence except as otherwise provided in Rule 104.

(2) Grand jury. Proceedings before grand juries.

(3) Juvenile Proceedings. To proceedings under the Maine Juvenile Code other than (a) probable cause determinations in bindover hearings and (b) adjudicatory hearings.

(4) Miscellaneous Proceedings. Statutory small claims proceedings in the District Court prior to rendition of judgment; proceedings for sentencing; issuance of warrants; proceedings with respect to release on bail or otherwise; proceedings for granting of probation or parole; proceedings on probation or parole violations; and proceedings for determination of probable cause.

(5) Contempt Proceedings. Those contempt proceedings in which the court may act summarily.

ADVISERS' NOTE

Subdivision (a) makes these rules applicable to all actions and proceedings in the named courts with the exceptions provided in (b). They do not apply in terms to the Administrative Court, which came into being under that name by P.L. 1973, c. 303. Previously the Administrative Code, 5 M.R.S.A. § 2301-52, had used the terms "Administrative Hearing Office" and "Hearing Commissioner", which were changed to Administrative Court and Administrative Court Judge. The purpose was to dignify the office with more appropriate titles. The matter is not of great practical importance because § 2405 provides that "the rules of evidence as applied in the trial of civil cases in the State shall be observed whenever practicable." This would incorporate these rules by reference. The permitted relaxation as to "facts not reasonably susceptible of proof under these rules" seems reasonable for this type of proceeding.

Subdivision (b) lists the exceptions from the applicability other than those with respect to privilege. Subsection (1) excludes determination of preliminary questions of fact except as otherwise provided in Rule 104, which makes the rules applicable to hearings on motions to suppress evidence and the like.

Subsection (2) concerns proceedings before grand juries. This is in accord with Maine law. State v. Douglas, 150 Me. 442, 114 A.2d 253 (1955).

Subsection (3) excludes various miscellaneous proceedings. It clarifies but does not appear to change Maine law. The rules do not apply to proceedings on probation or parole violations. The Supreme Court has held that due process must be observed on hearings to determine whether a condition of probation or parole has been violated. Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756 (1973). Due process does not, however, mandate observation of the rules of evidence. The same principles apply to adjudications of juvenile delinquency.

Subsection (4) excludes contempt proceedings in which the court may act summarily. This power is confined to cases where the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. M.R.Crim.P. 42(a).

These rules do not apply to proceedings before the Industrial Accident Commission. It would be beyond the authority of the Supreme Judicial Court to prescribe rules for hearings before the Commission. The Court in exercising its reviewing functions has commented upon the necessity of there being "competent evidence to warrant the Commissions' findings." See, e.g., Larrabee's Case, 120 Me. 242, 113 A. 268 (1921); Goldthwaite v. Sheraton Restaurant, 154 Me. 214, 145 A.2d 362 (1958). Some of the cases speak of its being bad practice to admit

hearsay but that when admitted without objection it can be given corroborating weight. In practice the Commission has heeded this advice.

EXPLANATION OF AMENDMENT
(October 1, 1976)

This amendment is a purely formal change to make it completely clear that the rules of evidence do not apply to small claims proceedings in the District Court. The statute, 14 M.R.S.A. §§ 7451-7457, calls for a "simple, speedy and informal procedure" in which "the technical rules of evidence shall not apply." It was never intended to alter this procedure, but the generality of Rule I 101(a) making the rules applicable to all proceedings in the District Court warrants an express exclusion of coverage of small claims proceedings.

ADVISORY COMMITTEE NOTE
(February 15, 1988 Amendment)

This amendment of Rule 1101 makes the rules inapplicable to proceedings for the determination of probable cause. Traditionally in probable cause hearings, for bindover of a defendant pending grand jury indictment, the rules of evidence have not been strictly applied. Usually the primary facts supporting the charge are established by evidence admissible under the rules, but subsidiary points are often established by hearsay and other inadmissible evidence. Strict applicability of the rules of evidence to preliminary proceedings of this sort could lead to needless formality in preliminary proceedings, waste of time, and abuse of preliminary probable cause hearings to harass the prosecution.

Federal Rule 1101(3) exempts probable cause hearings from the applicability of the Federal Rules of Evidence.

The amendment also makes clear what has already been accomplished by statute, namely that the Rules of Evidence do not apply to juvenile detention (analogous to probable cause or bindover hearings) but they do apply to juvenile adjudications. See Maine Juvenile Code, 15 M.R.S.A. § 3307(1).

Advisory Committee Note
(December 29, 1994 Amendment)

This amendment conforms the Rules of Evidence to recent amendments in the Maine Juvenile Code, 15 M.R.S.A. §§ 3001 et seq. The Maine Juvenile Code, as presently applied, contemplates a bindover hearing in the District Court at which the court determines whether there is probable cause to believe that a juvenile

crime has been committed and whether after consideration of the seriousness of the crime, the characteristics of the juvenile and the dispositional alternatives available to the Juvenile Court it is appropriate to prosecute the juvenile as an adult. 15 M.R.S.A. §3101. The Code provides that the Rules of Evidence shall apply "only to the probable cause portion of the bindover hearing." 15 M.R.S.A. §3101(4)(B). The Code also provides that the Rules of Evidence "shall apply in the adjudicatory hearing" (15 M.R.S.A. §3310(1)) but "shall not apply to dispositional hearings." (15 M.R.S.A. §3312(1)). Current practice in the Juvenile Court follows the requirements of the Code. This amendment brings the express language of the Rules in line with the Code as well.

Advisory Committee Note
(June 5, 1995 Amendment)

This amendment is intended to clarify the recent amendment of Rule 1101 with respect to juvenile proceedings. The rules do not apply to any activities in the juvenile court, regardless of how described or denominated, other than the determination of probable cause in bindover proceedings and adjudicatory proceedings.

RULE 1102. TITLE

These rules may be known and cited as the Maine Rules of Evidence.

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